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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

RICHARD KADREY, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 23-03417 VC
)	
META PLATFORMS, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, May 1, 2025

TRANSCRIPT OF PROCEEDINGS

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Thursday - May 1, 2025

10:00 a.m.

P R O C E E D I N G S

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THE CLERK: All rise.

Court is now in session. The Honorable Vince Chhabria is presiding.

Please be seated.

ZOOM RECORDING: Recording in progress.

THE CLERK: Calling Civil Action 23-3417, Kadrey, et al., versus Meta Platforms.

Counsel, please approach the podium and state your appearances for the record, beginning with counsel for plaintiffs.

MR. BOIES: Good morning, Your Honor. David Boies, of Boies Schiller and Flexner. I'd like to introduce also colleagues from Boies Schiller who are here: Maxwell Pritt, Jesse Panuccio, Joshua Stein, Margaux Poueymirou, and Jay Schuffenhauer.

THE COURT: Hi, everybody.

MR. PRITT: Good morning.

MR. CLOBES: Good morning, Your Honor. Bryan Clobes, from Cafferty Clobes, for the plaintiffs as well.

THE COURT: Hi.

MR. CLOBES: Hi.

MS. GEMAN: Good morning, Your Honor. Rachel Geman,

1 Lief Cabraser Heimann & Bernstein. I'm here along with my
2 colleague, Reilly Stoler.

3 **THE COURT:** Hi.

4 **MS. GEMAN:** Hi.

5 **MR. BOIES:** And, Your Honor, I would also like to
6 introduce three of our clients, who are here in the court:
7 Christopher Farnsworth, Andrew Greer, and Rachel Snyder.

8 **THE COURT:** Hi.

9 **MR. BOIES:** And we also have one of our experts,
10 Dr. David Choffnes, in the very unlikely event that the Court
11 would have any questions of him.

12 **THE COURT:** Okay.

13 **THE CLERK:** Your Honor, one other attorney. Sorry.

14 **THE COURT:** No problem.

15 **MS. DJORDJEVIC:** Good morning, Your Honor.
16 Nada Djordjevic, from DiCello Levitt, also here for plaintiffs.

17 **THE COURT:** Hi.

18 **MS. DJORDJEVIC:** Hi.

19 **MR. GHAJAR:** Good morning, Your Honor. Bobby Ghajar,
20 from Cooley, on behalf of Defendant Meta Platforms.

21 **THE COURT:** Good morning.

22 **MS. HARTNETT:** Good morning, Your Honor.
23 Kathleen Hartnett, from Cooley, also on behalf of Meta. And
24 I -- if you don't mind, we'll introduce some of our other
25 counsel here today.

THE COURT: Great.

MS. HARTNETT: We have Mark Weinstein and Judd Lauter from Cooley.

THE COURT: Hi.

MS. HARTNETT: We have Anna Stapleton and William Marks from Paul Weiss, and Mr. Shanmugam will be doing the arguing today for Paul Weiss from --

THE COURT: Mr. Shanmugam, you keep haunting my courtroom. What's going on?

(Laughter.)

MR. SHANMUGAM: For the record, as always, it's a pleasure.

THE COURT: All right. So --

MS. DUNNING: Your Honor, sorry. One more.

THE COURT: Oh. I'm sorry.

MS. DUNNING: Angela Dunning, from Cleary Gottlieb Steen & Hamilton, on behalf of Meta.

Thank you.

THE COURT: Hi.

MS. DUNNING: Good morning.

THE COURT: Okay. Mr. Shanmugam, maybe I'll start with you.

You know, I put out -- I put out a bunch of questions yesterday. I thought of more questions, and I almost put out another list of questions at midnight last night, but I decided

1 I shouldn't do that to you-all.

2 But I think, in a case like this, it's important probably
3 to zoom out and just develop a general understanding of the
4 issues that are presented by it and a general understanding of
5 the issues that are presented by the AI copyright dispute;
6 right?

7 I think it will be tempting for you to answer a lot of my
8 questions by saying, "Well, there's nothing about that in the
9 record" -- right? -- "and they didn't put anything in on that"
10 or "They didn't argue that" or whatever.

11 And I assure you that there will be plenty of time to
12 discuss what's in the record and what's not in the record, but
13 I was wondering -- if you wouldn't mind beginning the
14 discussion by just focusing on the issue in general without
15 regard to any of the facts in this case.

16 **MR. SHANMUGAM:** Sure.

17 So I'm happy to do that, Judge Chhabria. And I think
18 that, from our perspective, the key issues here relate to the
19 nature of the use and the absence of a market for a substitute
20 of use.

21 **THE COURT:** And I guess my -- my view is that -- I
22 agree with you, but as -- between those two issues, it seems to
23 me that the -- the most important question in these kinds of
24 cases is if the use -- assuming the use is transformative --
25 right? -- even highly transformative -- and I think -- you

1 know, I mean, I had a couple questions about that, but I think
2 that that's probably where we come out -- right? -- is that --
3 is that it's -- the use is highly transformative.

4 But we are told over and over again by the courts that the
5 fourth factor is the most important -- right? -- and the effect
6 of the use on the market for the copyrighted works is the most
7 important issue.

8 And it seems to me that you could have a case where the
9 use of the copyrighted works is highly transformative, but
10 nonetheless, it could have a massive effect on the market for
11 the copyrighted works such that it would not constitute fair
12 use.

13 Do you agree -- again, without regard to the facts of this
14 case or what's in the record in this case, do you agree with
15 that statement?

16 **MR. SHANMUGAM:** So I partially agree with that
17 statement. So let me explain why.

18 It is certainly true that the Supreme Court has said that
19 the fourth factor is the most important factor, but the Court
20 has also said that the two factors relate to each other. And I
21 think that the critical respect in which they relate to each
22 other is that, as the Second Circuit put it in the *HathiTrust*
23 case -- and I think that this is the best articulation:

24 "Under Factor 4, any economic harm caused by
25 transformative uses does not count because such uses, by

1 definition, do not serve as substitutes for the original work."

2 Now, why is that --

3 **THE COURT:** Well -- but I -- I understand that
4 concept, and I understand that quote, but what the courts also
5 tell us over and over again is that these fair use cases are
6 very fact-dependent and very context-specific. And I think
7 there's a real danger in taking quotes from cases that come out
8 of very different contexts and mechanistically applying it to
9 this very, very new context; right?

10 And this seems like a highly unusual case in the sense
11 that, although the copying is for a highly transformative
12 purpose, the copying leads to, or has the high likelihood of
13 leading to, the flooding of the markets for the copyrighted
14 works in a way that substantially diminishes the value of those
15 works.

16 And I -- and I think that that, you know -- and, again,
17 without regard to what evidence there is in the record of that
18 in this case, I think that is the -- the most important issue,
19 the most important question to be answered in these AI
20 copyright cases.

21 And it gets at some of the examples I -- I gave in my
22 questions; right? Like, you know, take the, you know -- well,
23 let's take the -- let's take -- let's keep it completely
24 outside the context of this case. I won't even use one of the
25 plaintiffs as an example. Let's just take newspaper articles;

1 right?

2 If, you know, an AI company is downloading and copying
3 news articles, copyrighted news articles, without permission,
4 that -- en -- en masse -- that it seems very likely to lead to
5 the creation of a product that will have the capability of and
6 likely will produce an infinite amount of content that will
7 diminish demand for the copyrighted works that were used to
8 feed the model and to the point that -- you know, it's not
9 inconceivable to imagine that the market for the copyrighted
10 works that were fed into the model could be eliminated
11 entirely.

12 And how could -- how could that be fair use?

13 **MR. SHANMUGAM:** Sure.

14 And I do think that that is what underlies -- I think it's
15 really Questions 2 through 5 that you sent us yesterday. You
16 used the example of the domestic violence --

17 **THE COURT:** Yeah, but now --

18 **MR. SHANMUGAM:** -- article.

19 **THE COURT:** -- I'm using the example of the
20 newspapers. So --

21 **MR. SHANMUGAM:** I think that the two examples come out
22 the same way under our analysis, and I think, really, the
23 critical question here is what market effects are cognizable
24 under the fair use test. And that's relevant, I think, both
25 for Factor 4 but, I think, more generally -- and I'm happy to

1 talk about the purposes of the fair use test in the zoom-out as
2 well.

3 So let me give you sort of our bottom-line answer and then
4 explain why I think it's the correct one. Our bottom-line
5 answer is that, for an effect to be cognizable, it has to
6 relate to what is protected under the copyright laws, which is
7 the expressive element of the work.

8 And so it would not be a cognizable effect merely to
9 produce the definitive article on the roots of domestic
10 violence. Keep in mind that that happens all the time. Take
11 academia. Somebody may be a Shakespeare scholar and may write
12 an article about Shakespeare that is the definitive analysis of
13 *Hamlet*, and it may draw very extensively on existing
14 scholarship.

15 But as long as it does not reproduce enough of the
16 expression from those earlier articles, there's not going to be
17 copyright infringement. And we think that the analysis comes
18 out the same way --

19 **THE COURT:** What if you -- what if you copy those
20 books without permission and then read them and then write the
21 definitive work on *Ham-* -- *Hamlet*?

22 **MR. SHANMUGAM:** Right.

23 Our view is that the protected market effects, for
24 purposes of the fourth prong, should operate in essentially the
25 same way, which is to say that, in figuring out what effects

1 count, we are guided by the underlying purpose of the copyright
2 laws, which is, after all, as the copyright clause says, to
3 protect the progress of science and useful arts.

4 When you take a look at the case law -- and I would point
5 as examples of this, but I think there are others -- to the
6 Ninth Circuit's decisions in *Connectix* and *Accolade*, the
7 morph -- the mere fact that you're producing a rival product
8 that obviously is going to have some effect on the sales of the
9 initial product is not enough.

10 And I would submit that it is for that reason. It is
11 because you're drawing on the functional elements in the
12 reverse engineering software cases in order to produce the
13 alternative product, and, of course, this is all consistent
14 with the broader principle that there are all sorts of effects
15 in the fair use context.

16 There are the effects of a parody. There are the effects
17 that the Supreme Court has recognized of a negative review.
18 And in all those cases, those effects are not cognizable.

19 **THE COURT:** But let me -- let me -- again, I mean, I
20 don't want to sound like a broken record, but, you know, we are
21 told over and over again that, you know, the fair use analysis
22 is fact-dependent and context-specific; right?

23 And in the -- I think most of the cases, if not all of the
24 cases you're referring to -- you have one product -- right? --
25 and it's a copyright-protected product, and somebody uses that

1 product or that work to develop another product or work, and
2 the -- the product that is developed partly as a result of the
3 copying is one product in the market that's competing with the
4 copied product; right?

5 In this case, you have companies using copyright-protected
6 material to create a product that is capable of producing an
7 infinite number of competing products; right? So, to use the
8 domestic violence example, you -- you know, you have a book on
9 domestic violence and the causes of domestic violence and
10 the -- the things we need to do to combat domestic violence.

11 And by -- by -- by training the product with copyrighted
12 works relating to domestic violence, you are giving the product
13 the ability to produce a million articles on domestic violence
14 addressing the same issues that are addressed by the
15 copyrighted work.

16 And so you are dramatically changing -- you might even say
17 obliterating -- the market for that person's work, and you're
18 saying that you don't even have to pay a license to that person
19 for using their work to create the product that's destroying
20 the market for their work. I just don't understand how that
21 can be fair use.

22 **MR. SHANMUGAM:** Sure.

23 So let me address that directly. I'm going to start with
24 an answer that you may not want to hear, which is that, in this
25 case, it is a fact-dependent analysis, and there really is no

1 record of such an effect. At most, there is speculation about
2 the possibility.

3 **THE COURT:** I understand that --

4 **MR. SHANMUGAM:** So --

5 **THE COURT:** -- and I assure -- I -- again, I assure
6 you that we'll have plenty of time to talk about the record.
7 That's what -- I think, in this case, the record relating to
8 Factor 4 is the most important thing.

9 But I also think, in general, the issue of Factor 4 and
10 how big of a deal it is, you know, when put up against the
11 transformative effect of the -- of the product is -- is the
12 most important.

13 **MR. SHANMUGAM:** Yeah.

14 And just to set this on the table for purposes of the
15 subsequent discussion here --

16 **THE COURT:** Yeah.

17 **MR. SHANMUGAM:** -- I think that there are actually a
18 variety of different types of effects that the other side could
19 point to, and the one that we've been discussing is one that
20 they conspicuously have not been relying on.

21 I think, if you take a look at plaintiffs' briefs -- and I
22 hope that this is a fair characterization of their argument --
23 they're really relying on two things. First, they are relying
24 on the purported market for licensing for this particular
25 purpose.

1 And, second, they are relying on an argument with regard
2 to their claim about the reliance on the online data sets, that
3 they were deprived of sales of their product that could have
4 been used in lieu of obtaining these works from Book 3 and the
5 like.

6 **THE COURT:** Those seem like sort of the flip side of
7 the same coin, as far as I can tell.

8 **MR. SHANMUGAM:** Well, I think that there are slightly
9 different responses to both of them.

10 But in the end, I think, with regard to the -- the
11 relevance of these market effects, our view is the same with
12 regard to really all of them, which is that if you think that
13 it is a highly transformative use -- that the market for those
14 transformative uses cannot be the correct market for purposes
15 of Factor 4.

16 **THE COURT:** Well -- but -- but -- I mean, I think I
17 would agree with you to an extent on that; right? And let me
18 make sure we're understanding each other.

19 **MR. SHANMUGAM:** Sure.

20 **THE COURT:** So I agree that, you know, you -- you
21 know, the -- let's say that we consider the transformative use
22 to be the development of an AI model that is capable of doing
23 all these things.

24 Is that how you would characterize it?

25 **MR. SHANMUGAM:** Yes. We would agree with that

1 description of the use.

2 **THE COURT:** Okay. Okay. So -- so that's the
3 transformative use, but if the -- well, we'll agree on that for
4 the moment.

5 The -- I certainly agree with you that we -- we're not --
6 we shouldn't be considering the entire market for all of the
7 uses that the new model can be put to; right? But the new
8 model is capable of producing works that are in the same genre
9 of, or quite comparable to, the works produced by the -- by
10 the -- by the -- by the people whose material was fed into the
11 model; right?

12 And if we -- if we analyze those works -- right? -- the
13 works that the model produces that are similar to, or in the
14 same genre of, the works of the people whose material was
15 copied, I think the likely conclusion is that the -- the
16 transformative use will come close to obliterating the market
17 for the works of the people whose material was copied.

18 And I just don't -- to say -- I mean, in a doctrine that
19 is so fact-specific and so context-specific and so -- and a
20 doctrine that tells us that different factors and different
21 effects may be important in one case and not another, I just
22 don't see how we can bury our head in the sand to that -- that
23 likelihood.

24 **MR. SHANMUGAM:** Yeah.

25 So I think we're a little bit hamstrung here in two

1 respects. First, again, I really don't think this is the
2 theory that the plaintiffs have relied on.

3 **THE COURT:** I --

4 **MR. SHANMUGAM:** And, second, we don't have a record to
5 that effect. But if we did have such a record, I'd want a
6 joint issue. If we found ourselves, two years from now, in a
7 world in which there was a robust record that AI tools were
8 having this impact --

9 **THE COURT:** Well, I don't know if you need to wait
10 until it has the impact; right? I mean --

11 **MR. SHANMUGAM:** Potential effects can count. So --

12 **THE COURT:** Potential effects can count.

13 And I would think, to put it in practical terms --
14 right? -- if the plaintiff had come here -- plaintiffs had come
15 here, you know, to this summary judgment hearing with an expert
16 report that laid out, in reliable terms, that the process of
17 feeding all this copyrighted work into the model will -- will
18 create a likelihood that massive amounts of content will be
19 produced by Llama that will sort of serve as potential
20 substitutes for the plaintiff's works, then I think you -- I
21 think you would -- you might lose on summary judgment or -- or
22 at trial -- right? -- because this factor is -- I mean, if --
23 if it's important to consider what I just described, then I --
24 you know -- and I think you're -- I think you're destined to
25 failure in these cases.

1 **MR. SHANMUGAM:** Well, let me push back on that a
2 little bit --

3 **THE COURT:** Okay.

4 **MR. SHANMUGAM:** -- with respect, Your Honor, as a
5 matter of law. And, again, I'm going to go right back to the
6 purpose of copyright law.

7 The copy- -- purpose of copyright law is to protect
8 expression. And when you take a look at the enumerated rights
9 that are listed in the Copyright Act, you know, first and
10 foremost is the exclusive right to reproduce your expression.
11 Again, throughout copyright law, expression is protected; ideas
12 are not.

13 And the consequence --

14 **THE COURT:** But how -- but it's -- how can you say
15 that the expression is not being reproduced when the copying of
16 the expression gives the machine the ability to engage in
17 similar expression?

18 **MR. SHANMUGAM:** But then transformation takes place;
19 right? You know, the transformation here is that the machine
20 is not retaining the expression. The machine is being trained
21 in a very specific way. It's being trained in the
22 relationships between words, between tokens, which can be parts
23 of words.

24 And so the expression falls out of the equation and --

25 **THE COURT:** But if -- how does it fall out of the

1 equation if -- I mean, I'm assuming that if -- if Meta were
2 unable to train its model with any domestic-violence-related
3 content, then the model would not be capable of producing a
4 *New Yorker*-style article that goes -- goes on at length about
5 the causes of domestic violence and what we need to do to
6 combat it; right?

7 **MR. SHANMUGAM:** That -- that may be true, but, again,
8 I come back to the fact that what copyright law doesn't protect
9 against is what takes place, for instance, in my academic
10 hypothetical.

11 So, in other words, you're not entitled to protection from
12 competition in the marketplace of ideas. What copyright law is
13 giving you is a limited monopoly. It's a monopoly in your
14 expression itself, and I think one way I sort of find this --

15 **THE COURT:** Right, but if I'm going to -- if I'm going
16 to steal things from the marketplace of ideas in order to
17 develop my own ideas, that's copyright infringement; right? I
18 mean, if I'm a professor and I distribute -- if I buy a book,
19 and I make 18 photocopies of it, and I distribute the
20 18 photocopies to my students, that's copyright infringement.

21 And the fact that the students are going to absorb the
22 18 -- the books, along with a bunch of other material that they
23 will absorb, and then do -- create things that may compete with
24 the original book doesn't absolve you from copyright
25 infringement in that -- in that -- on that fact pattern, does

1 it?

2 **MR. SHANMUGAM:** Well -- and I think that that is
3 right, but I think that that's because the analogy to humans is
4 imperfect, and it's imperfect in two respects.

5 **THE COURT:** Well, you just made it. So -- for the
6 record.

7 **MR. SHANMUGAM:** Well -- well -- but -- but, for the
8 record, to respond to Question Number 1, I think the reason why
9 humans are different is, first, because the training of an AI
10 tool like Llama is different for the reasons that I alluded to.
11 The AI tool is being trained in this very specific, narrow way.

12 It is very different from a human being reading a book,
13 which is, after all, the purpose for which books are originally
14 written. And I also think that, here, you have a tool at the
15 end of it. That is the use, as we discussed. The use is the
16 development of this particular tool, and I don't think you can
17 describe the development of a human as a use.

18 That human is then going to go on and engage in particular
19 uses, which may be transformative or not. But, again, I want
20 to sort of come back to where we started here in this
21 particular colloquy and really drill down on this question of
22 what exactly it is that these, as you described them, rival
23 works would be doing.

24 I think there are a couple of possibilities. One is that
25 they are taking content, which, of course, is unprotected --

1 that's the idea/expression dichotomy -- and producing that
2 content for -- potentially in a more attractive way. And,
3 again, that's the sort of competition that I think the
4 copyright laws do not protect against. That's the balance of
5 the copyright laws. Expression is protected; underlying ideas
6 are not.

7 There is a similar version of this that you see, to some
8 extent, in the materials, which is the question of style. And
9 so if you have a singer who comes along and produces works in
10 the style of Taylor Swift, but they're more attractive to
11 listeners than Taylor Swift's own works, again --

12 **THE COURT:** That's impossible.

13 **MR. SHANMUGAM:** No. I -- I --

14 (Laughter.)

15 **MR. SHANMUGAM:** Of course, for the record, I agree
16 with that.

17 But, ultimately, that is not protected by the copyright
18 laws, either, and that's really what these arguments sound in.
19 These arguments, in the end, relate to things that the
20 copyright laws don't protect against. Now, in the world of AI,
21 perhaps we would want there to be such protection, but --

22 **THE COURT:** But here -- here's -- let's stay -- let's
23 stay on the Taylor Swift example for a second, shall we?

24 **MR. SHANMUGAM:** Sure.

25 **THE COURT:** So I think -- I think I agree with

1 everything that you said about Taylor Swift -- right? -- that
2 if -- you know, if you feed her works and a bunch of other
3 works into an AI model, and you then ask the A model -- AI
4 model to produce songs in the style of Taylor Swift, that is
5 not going to affect the market for Taylor Swift songs; right?

6 **MR. SHANMUGAM:** Well --

7 **THE COURT:** And even if -- even if a million songs are
8 produced by the model in the style of a Taylor Swift song, it's
9 not going to affect the market for Taylor Swift songs.

10 But what about the next Taylor Swift? What about the --
11 the up-and-coming, relatively unknown artist who is writing
12 songs and copyrighting songs, and the -- Meta uses her works
13 and feeds them into the -- the model? And by feeding
14 copyrighted works like hers into the model, it enables the
15 model to produce a billion pop songs; right?

16 It makes it much less likely that that new artist is going
17 to break through and become the next Taylor Swift because the
18 market has been so dramatically changed for songs in the style
19 that this new artist is writing.

20 **MR. SHANMUGAM:** So I think you could have that effect
21 even on the great Taylor Swift. You could have that effect on
22 a new artist.

23 But I think our answer is the same, that that is the sort
24 of competitive effect that the copyright laws do not protect
25 against. And, again, I acknowledge that, in some cases, you

1 might have a stronger factual case that --

2 **THE COURT:** But, again, I'm --

3 **MR. SHANMUGAM:** -- that's taking place.

4 **THE COURT:** Okay. Sorry to interrupt.

5 **MR. SHANMUGAM:** But the one other thing I would say on
6 this, though, is that that is where substantial similarity
7 comes into play in the ordinary infringement context.

8 So there could come a point at which, if a model produced
9 a song that was close enough in expression, or if a model
10 produced a work that, as has decidedly not been proven with
11 regard to Llama, reproduces the expression of an author in a
12 sufficiently similar way, of course, then you have a relevant
13 effect because you have a work that can be characterized as
14 substitutive, and you would have ordinary infringement as well.

15 Those two concepts, I think, need to be understood in the
16 same way, and I really do think that that's why the cases talk
17 about this in terms of substitutive effects as opposed to other
18 effects. And otherwise, I think --

19 **THE COURT:** Right, but -- but -- but substitutive
20 effects is -- it seems to me, is a relevant concept here. I
21 mean, I think -- aren't -- aren't we discussing substitutive
22 effects when we talk about the person who's trying to become
23 the next Taylor Swift and the market is flooded with similar
24 songs partially as a result of copying her song?

25 Why isn't that not -- why aren't we talking about

1 substitutive effects there?

2 **MR. SHANMUGAM:** I think the reason we aren't is
3 precisely because it is not substitution of a work with similar
4 expressive content. And I think that the problem with all of
5 this is, otherwise, I think you lead very quickly to a
6 circularity problem because -- and I think, actually, the best
7 way to understand this is with regard to the argument that the
8 plaintiffs are making with regard to the development of a
9 license market for this particular AI person.

10 **THE COURT:** I understand your arguments about that,
11 and I agree with you. So I don't know if it's necessary to
12 talk about that argument that they're making.

13 **MR. SHANMUGAM:** Oh. I'm happy -- well, as you're
14 aware, when the Supreme Court itself has sort of talked about
15 the fourth factor, it has, quoting the *Nimmer* treatise, talked
16 about the fact that, in any fair use case, you can say that
17 that is true.

18 And so I think the way to kind of break the circle here is
19 to say, look, again, when you have a highly transformative use,
20 by definition, what you say is that those uses do not qualify
21 as relevant substitutes for Factor 4.

22 **THE COURT:** Right.

23 And I think -- I think the problem -- I think the
24 difference we're having is that, in my view, you're -- you're
25 taking a highly formalistic approach to this question in an

1 area of law that tells us not to do that; right?

2 I mean, it -- I think that it's probably true that, in
3 most copyright cases, you need to look at, you know, the first
4 factor in the way that you're describing it, but it's -- as
5 Justice Breyer and others have told us over and over again,
6 it's -- we're not supposed to be taking that highly formalistic
7 approach such that we are mechanistically applying the concept
8 from one case to the next case. It really depends on the
9 facts.

10 And in this case, you know -- well, not this -- maybe not
11 this particular case, but in this area, in this type of case,
12 what I'm saying is that it seems highly plausible, at a
13 minimum, that copying people's protected works and using it to
14 train models will, in some con- -- in some situations, come
15 close to obliterating the market for the work of the person
16 whose material is copied.

17 And the reason is that the copier is not just producing
18 one work. The copier has the capability of producing a billion
19 works and completely changing the market for this -- this type
20 of work, and you seem to be telling me that, in the fair use --
21 in the fair use analysis, I have to ignore that; I have to
22 disregard that possibility. And I just don't think that that
23 is how the fair use doctrine works.

24 So I think that's inconsistent with what the courts have
25 told us about how to think about fair use doctrine.

1 **MR. SHANMUGAM:** Yes. So let me say a couple of things
2 about that.

3 First, one of the questions you asked was the question of
4 whether or not you have a case where there is a transformative
5 use, and yet the courts have said not fair use because of the
6 market effects.

7 And we are unaware of any case -- I don't think that the
8 plaintiffs have cited any -- where you have a highly
9 transformative use and that has been found to be the case.

10 **THE COURT:** What if you took out the word "highly"?
11 What if you said "a transformative use," not "a highly
12 transformative use"?

13 **MR. SHANMUGAM:** So there are a couple of cases, I
14 believe, from the Second Circuit. There is the *Fox News* case.
15 There is also the *Warner Bros.* case.

16 But they're not really great cases because, in the
17 *Fox News* case, I think that there is a genuine question about
18 how transformative the use actually was. And in the
19 *Warner Bros.* case, the court said that the use was
20 transformative and yet said that the first factor pointed in
21 the plaintiff's direction.

22 So neither one of them, I think, is a very good fit for
23 this situation.

24 **THE COURT:** Well -- but -- but how transformative -- I
25 mean, that gets us to the question of -- of how to think of the

1 issue of transformative in this case. How transformative is
2 the use when the works that are being produced are cheap
3 imitations of the original?

4 **MR. SHANMUGAM:** Well, I think, in that circumstance --
5 and, again, I am not going to fight you on the facts other than
6 to, once again, point out that we don't really have a record on
7 any aspect of this.

8 **THE COURT:** Right.

9 **MR. SHANMUGAM:** So we are engaging in -- in
10 speculation as a factual matter, but I want to really directly
11 address the real concern, and I'll bring it back to broader
12 principles as well.

13 So I think, when it comes to the transformative nature of
14 the use, again, this is a context in which it is quite clear
15 that the inability to reproduce expression is a large part of
16 what makes this use transformative.

17 As the Court is aware, the primary case we rely on is
18 *Google Books*, and that is a context in which even those
19 snippets of the expression itself are reproduced. The court
20 still said transformative use, in part, because of the broader
21 purpose for which those snippets were being used.

22 **THE COURT:** Yeah.

23 And I -- and the *Google* case is very helpful as far as it
24 goes. But, you know, in the *Google Books* case, there wasn't --
25 a product wasn't created that -- that had the -- as a result of

1 the copying that had the ability to produce a billion new works
2 in the same genre as the work that was copied.

3 **MR. SHANMUGAM:** It's not an unhelpful case to us in
4 the sense that I think that the Second Circuit --

5 **THE COURT:** It's not unhelpful, but I just don't --
6 and it's helpful because it's a really good description of
7 copyright law, but I -- I think that case underscores the point
8 I'm making, which is that it's all context-specific.

9 And in this case, unlike that case -- or in these types of
10 cases, unlike that case, you have -- you're creating a product
11 that has the ability to create a billion works that it -- or
12 likely has the ability to create a billion works that are
13 similar to the work that's being copied.

14 **MR. SHANMUGAM:** So *Google Books* is a really helpful
15 case to us, just to be clear, and it's really helpful to us
16 because I think it's the closest analogue, at the appellate
17 level, to what's going on here. But I think it's helpful to us
18 even --

19 **THE COURT:** But why is it -- if it doesn't -- how
20 could it be such a close analogue if it doesn't have what I
21 just described?

22 **MR. SHANMUGAM:** But it's helpful to us even with
23 regard to the Factor 4 issue, which we've been discussing,
24 because, of course, the Second Circuit recognized that some
25 individuals might be looking for the snippets that are

1 reproduced by *Google Books* and, therefore, that the authors
2 would lose sales of the books as a result.

3 And yet the court nevertheless concluded, in that
4 context, that there was fair use.

5 **THE COURT:** And that makes sense to me. I mean, if --
6 if you're -- you are -- what you're doing is you're putting up
7 the transformative use against the effect on the market --

8 **MR. SHANMUGAM:** Correct.

9 **THE COURT:** -- for the copied work; right?

10 And just because the market for the copied work is
11 affected to a degree doesn't automatically mean that the
12 defendant loses on fair use -- right? -- because it may be that
13 the work is so transformative and the effect on the market for
14 the copied work is so de minimus or minimal that, when you're
15 balancing, you know, the defendant comes out ahead.

16 **MR. SHANMUGAM:** Well --

17 **THE COURT:** But I think the problem is that the
18 effect -- the potential effect on the market for the copied
19 work in this case is so much more tectonic than in
20 *Google Books*.

21 **MR. SHANMUGAM:** So I want to point you to what the
22 Supreme Court said in its most recent fair use case on this,
23 and it was quoting from the *Google Books* case when it said
24 this.

25 It said, quote, "The more the appropriator is using the

1 copied material for new transformative purposes, the more it
2 serves copyright's goal of enriching public knowledge, and the
3 less likely it is that the appropriation will serve as a
4 substitute for the original or its possible derivatives,
5 shrinking the protected" -- "the protected market opportunities
6 of the copyrighted work."

7 **THE COURT:** Right.

8 And that, I think, gets to the question that I asked you,
9 and then I think -- before you had a chance to answer it, I
10 think I interrupted you, but -- and I apologize for that.

11 But, you know, how transform- -- if the -- if the use that
12 is affecting the market for the copied work is the production
13 of similar works, cheap imitations of those works, whatever you
14 want to call it -- right? -- how transformative is it really?

15 **MR. SHANMUGAM:** So it won't surprise you to hear me
16 say that we do not think that that's a fair way to characterize
17 the purpose of AI tools. AI tools have all sorts of purposes.

18 **THE COURT:** Not the purpose of AI tools, but it's
19 the -- but if you're comparing the -- the use that the
20 copyright holder is complaining of -- right? -- copyright
21 holder -- again, you could imagine -- you know, you can
22 imagine it -- let me think of -- let me see if I can think of
23 another example.

24 You know, cookbooks. I'm the author of a cookbook, and
25 I -- you know, you're feed- -- it's a copyrighted work, and

1 you're feeding my book into the model to train it, and you're
2 feeding other copyrighted cookbooks into the model to train it.

3 And as a result, what is happening is people are
4 producing -- people have now -- are producing billions of
5 cookbooks using artificial intelligence, and there's really
6 no -- no longer -- the market for my book has become so diluted
7 that it's not even worth writing another cookbook because I'm
8 not a famous chef. I'm up-and-coming; right? I'm not the
9 Taylor Swift of cookbooks. I'm the next Taylor Swift -- or I
10 want to be the next Taylor Swift of cookbooks.

11 And, you know, so if it -- in a case like that, the
12 plaintiff comes in and complains that the conduct that's being
13 engaged in is the creation of a -- of a system that allows
14 for -- that causes the proliferation of cookbooks in a way that
15 obliterates the market for my cookbook, I think you can't
16 answer that by saying, "Well, AI does a lot of other things,
17 too."

18 You have to say -- I think the question is, you know,
19 "It's great that AI does a lot of other things, but is there a
20 way to prevent AI from proliferating a billion new cookbooks?"
21 And if there's not a way to prevent AI from proliferating a
22 billion new cookbooks, then you need to pay a license to the
23 author of the cookbook that you -- that you used to train your
24 model.

25 **MR. SHANMUGAM:** Sure.

1 So let me -- there are a lot of parts to that. So let
2 me --

3 **THE COURT:** Pay royalty, I should say. Sorry.

4 **MR. SHANMUGAM:** Yeah.

5 So let me address each of those -- each part of that. I'd
6 point to the fact that AI has much broader and very different
7 purposes, really primarily for purposes of underscoring how
8 highly transformative it is. I think all of that is fair game
9 for purposes of Factor 1 because, under Factor 1, you are
10 looking at the purpose and character of the use.

11 So the fact that it has this broader purpose is highly
12 germane and relevant to that analysis. I think what we have
13 really been focusing on is the question of what Factor 4 is
14 designed to address.

15 And I think one thing that is really important, whether
16 we're talking about cookbooks or whether we're talking about
17 the next Taylor Swift -- I think, in both of those
18 circumstances, the fact that a technology comes along and has
19 an effect on the ability of a new artist or a cookbook author
20 is not enough, in and of itself, to give rise to a problem such
21 that there is no fair use because, regardless of whether the
22 tool trains on the works of that new artist or whether it
23 trains on the works of the cookbook, whether it's a cookbook
24 author or whether it's the new Taylor Swift, in either of those
25 circumstances, you could still have exactly the same effect,

1 and it's an effect that the copyright laws do not protect
2 against.

3 And I think maybe the best example of this in the case law
4 is the *Sony Betamax* case. Now, keep in mind that that was a
5 case where the court concluded that there was fair use, even
6 absent transformation, and that was a context in which a lot of
7 the same arguments about the effect of this on the marketplace
8 for film, for television shows were made. And yet the
9 Supreme Court said that is not enough to defeat the conclusion
10 that there is fair use, and I think that the same is true here.

11 I think, when you look at both the Supreme Court's cases
12 and the cases in the Courts of Appeals, you have similar broad
13 arguments about the effect of rival products, the effects on
14 sales. And the Supreme Court has focused on effects that are
15 relevant to the expression that is being protected and effects
16 that relate to non-tran- -- substitution in the market for
17 non-transformative products.

18 And so that is really the line that we're trying to
19 extract from these cases. Now, what is the principle
20 underlying this line? I think it is the principle that I cited
21 earlier, which is the principle underlying the whole copyright
22 system, the balance that the copyright system strikes between,
23 on the one hand, protecting authors' expression and, on the
24 other hand, ensuring innovation, promoting the progress, as I
25 discussed earlier, of science and the useful arts.

1 **THE COURT:** But how is -- how is that -- how is that
2 balance struck properly if your -- if a company is allowed to
3 copy somebody's work without protection -- without permission,
4 and that is going to result in the creation of a product that
5 could obliterate the market for that person's work?

6 I just -- I mean, the balance between protecting
7 somebody's right to expression and the -- the need to promote
8 innovation -- I just don't see how that balance is struck
9 properly by allowing a company to download protected works
10 without permission, not pay for them, and use it to -- to
11 create a product that is capable, and probably likely, to
12 destroy the market for the copyrighted work.

13 **MR. SHANMUGAM:** So, again, I -- you know, we have a
14 statute that sets out these factors. And I think, as a
15 practical matter, the way that the statute currently strikes
16 that balance is by protecting transformative uses and
17 protecting transformative uses in the absence of a market
18 effect on the non-transformative aspects of the market, which
19 is to say the expressive aspects of the market. And that is
20 the balance that Congress has currently struck.

21 And I think, in an area like this involving a new
22 technology, I would respectfully submit that a court should be
23 reticent about wading in in a way that would impede the
24 development of that new market, at least absent some direction
25 from Congress.

1 **THE COURT:** What is the evidence that it would impede
2 the development of the new market to -- to rule that that --
3 the companies developing these products are required to pay --
4 or required to get a license to use copyrighted works?

5 **MR. SHANMUGAM:** So leaving aside the effects of
6 damages awards and the other remedies that are being sought on
7 a class-wide basis by the plaintiffs in this case, I would
8 really point to the impracticality of developing a licensing
9 regime on which -- I would submit that the record before this
10 Court is clear.

11 The record before this Court reflects that a licensing
12 regime, especially in this context, in the context of trade
13 books, would be impractical and has not developed. And as this
14 Court is aware, the plaintiffs have pointed to only one
15 example, the example of an agreement between another technology
16 company and another publisher, which is an agreement for online
17 access that proved, as the record illustrates, not to be
18 effective even as to the authors --

19 **THE COURT:** You're telling me that these companies
20 couldn't figure out how to develop a market for copyrighted
21 works if it was important to use the copyrighted works to
22 develop their AI technology?

23 **MR. SHANMUGAM:** I think that the fundamental problem
24 that gives rise to a market failure in this context is the fact
25 that any individual work has relatively low value for purposes

1 of training one of these tools, and the rights to these books
2 are held not by the publishing houses but by the individual
3 authors.

4 And so -- and, again, I think that we do run fairly
5 quickly into this circularity problem, which is that, unless
6 the plaintiffs can come forward with an actual record to this
7 effect, what we're really talking about is the mere possibility
8 that, in the face of a finding of no fair use, such a market
9 could theoretically develop, which the Supreme Court has told
10 us is not cognizable for purposes of Factor 4.

11 **THE COURT:** Let me look at my list of questions to see
12 if there's -- there are any other questions I want to pose to
13 you regarding, you know, this AI copyright issue generally --

14 **MR. SHANMUGAM:** Sure.

15 **THE COURT:** -- before we turn to the record and --

16 **MR. SHANMUGAM:** Sure.

17 **THE COURT:** -- you know -- it seems like so long ago
18 that I wrote these questions.

19 (Laughter.)

20 **MR. SHANMUGAM:** It wasn't so long ago that we received
21 them, but --

22 (Laughter.)

23 **THE COURT:** No. I mean, I wrote them the same day
24 that you received them.

25 (Laughter.)

1 **THE COURT:** Oh, yeah.

2 Okay. There's at least one. Hold on.

3 Okay. I guess I'd -- I'd like to -- I'd like to talk a
4 little bit more about different types of works and -- and how
5 it might affect the way we think about cases like this,
6 including this case -- right? -- because the -- the plaintiffs
7 have -- I think there are, what, like, 12 or 14 plaintiffs or
8 something like that.

9 And -- and, you know, one or two of them have written
10 nonfiction. I believe that one or two have writ- -- of them
11 have written memoirs. I think there's a -- there's a poet;
12 right? And there are -- and it's mostly -- other than that, I
13 think it's all fiction authors; right?

14 It seems like -- and, again, without regard to the record
15 in this case, it seems like, in these cases, the -- the effect
16 of AI models on the market for the copyrighted works will often
17 really depend on what type of work it is.

18 For example, there was a reason I chose the domestic
19 violence example -- right? -- because intuitively, at least, it
20 seems easier to imagine the market for nonfiction -- protected
21 nonfiction works being diminished more rapidly than the market
22 for fiction works; right?

23 And I used the example of newspaper articles; right? It's
24 even easier, I think, to imagine the market for copyrighted
25 newspaper articles being diminished extremely rapidly by using

1 copyrighted news articles to train an AI model. I think it --
2 with visual art, it's probably easy to imagine pretty quickly
3 the market being diminished. Fiction is a little bit harder.

4 And so, again, maybe without -- I'm not trying to get into
5 the record on this case yet, but I was wondering if you could
6 comment on that. I mean, do you -- do you agree there are
7 going to be significant differences, even -- I know you don't
8 accept the idea that I can even consider this as part of the
9 fair use analysis; right?

10 But assuming I disagree with you about that, what -- is it
11 going -- is -- is it going to be a very different market
12 analysis, depending on what type of work it is?

13 **MR. SHANMUGAM:** Well, I think this actually brings out
14 an issue that we have been talking about, which is that I think
15 it's no accident that the hypotheticals that we've been
16 focusing on are domestic violence, newspaper articles,
17 et cetera, because those are contexts in which the secondary
18 work that is produced is a work that draws on facts and ideas.

19 In the newspaper contexts, that's probably clearest.
20 Chances are that, when we're in the context of a newspaper
21 article, it's not that the AI tool is producing a work that
22 draws on the expression of a distinctive -- right? -- or like
23 Maggie Haberman. It's probably drawing on what she's reporting
24 about what's going on in the administration, unprotected facts,
25 unprotected ideas.

1 And it's a lot harder, in the context of fiction -- of
2 fiction, to come up with an analogue to that. But I think the
3 closest analogue is work produced in the style of Junot Díaz,
4 and that's like our Taylor Swift hypothetical from earlier.
5 And the problem with that, again, is that the style is not
6 protected; the expression is.

7 So in the context of visual art, if you have visual art
8 that is produced that is substantially similar in the form of
9 the expression, that can give rise to copyright infringement.
10 That would be protected if you created an alternative market
11 for work that was sufficiently similar.

12 So I think this all fits together in terms of the
13 application of the principle -- or at least the principle that
14 we are advancing. I think it is a lot harder to know how it
15 would work in a world in which you are just measuring
16 diminution in sales, regardless of the extent to which the
17 alternative product contains an expressive component.

18 It seems like that's probably going to have to end up
19 being a factual question, one way or another. And, again, we
20 don't have a record at all, in this context, to show that
21 that's taking place with regard to these particular plaintiffs.

22 **THE COURT:** Okay. So -- so now, at long last,
23 let's -- let's turn to the record in this case, and, you know,
24 you've heard what I view to be the most important issue for,
25 you know, deciding this type of case. You may disagree with

1 me, but you've -- you've heard what I believe to be the most
2 important issue.

3 I don't think that anybody can win one of these cases
4 without winning pretty decisively on Factor 4; right? I think
5 that's the only path to victory in a case like this for a
6 plaintiff.

7 And so what -- what is the -- what is the -- what do we
8 have in the summary judgment record about the issues that we've
9 been talking about in terms of the ability of the model to
10 flood the market with works that are similar to the works of
11 the -- similar to the copied works?

12 **MR. SHANMUGAM:** Sure.

13 So this is really a question, in the end, for the
14 plaintiffs, but let me offer my characterization of what I
15 think we have in the record, which is not very much, with
16 regard to the type of market effect that you had posited at the
17 beginning.

18 So, you know, their expert on these issues is Spulber, and
19 I think that the most that can be said --

20 **THE COURT:** And Spulber is an economist; right?

21 **MR. SHANMUGAM:** Yes.

22 **THE COURT:** Not -- not an expert on AI and what sort
23 of thing it's going to produce -- things it's going to produce
24 and all that; right?

25 **MR. SHANMUGAM:** Correct.

1 And when you take a look at Spulber, I think that the most
2 that can be said about Spulber, you know, reading the testimony
3 charitably, is that he speculated about the possibility that
4 the outputs of AI tools could compete for attention in the way
5 that we have been discussing. That's Paragraphs 192 to 203 of
6 Plaintiffs' Exhibit 126.

7 But then he goes on to say that he's not aware of any
8 particular instance in which this has occurred as to the
9 plaintiffs. He says, "You are not aware" -- the question was,
10 "You're not aware of any instance when output generated by Meta
11 AI acted as a substitute for one of plaintiffs' books?"

12 "Answer: No, I'm not." And that's Mr. Ghajar's
13 Exhibit 25, at Pages 247 to 248. So that's from the deposition
14 testimony.

15 **THE COURT:** Right.

16 **MR. SHANMUGAM:** That is all we have with regard to
17 that particular effect --

18 **THE COURT:** Yeah, but -- but --

19 **MR. SHANMUGAM:** -- and so --

20 **THE COURT:** But I don't -- I think you agreed with me
21 earlier that it's -- that it's -- a plaintiff is not required
22 to present evidence that it's already happening; right? They
23 could present evidence that it's about to happen, or it's
24 likely to happen; right?

25 If -- if this chain of events is set off or allowed to

1 continue -- and when I say "chain of events," I mean a chain of
2 events that includes downloading these works without permission
3 and without paying royalties -- this is what's going to happen
4 to the market.

5 I mean, if there were a -- if there were a reliable expert
6 opinion that presented something like that, that would
7 presumably be enough to go to trial on the fourth factor;
8 right?

9 **MR. SHANMUGAM:** Well -- so, you know, again, I do want
10 to respectfully reiterate that, from our perspective, this is
11 not the relevant market, as a matter of law. I would also
12 acknowledge, as I did earlier, that the fourth factor looks at
13 the effect upon the potential market.

14 I do think that it is, you know, incumbent on a plaintiff,
15 recognizing that we bear the ultimate burden -- but, of course,
16 we're trying to prove a negative, which is something the courts
17 have recognized is -- is particularly challenging with regard
18 to the fourth factor.

19 And I think, in this circumstance, it's incumbent on a
20 plaintiff, once the relevant market has been identified, to
21 come forward with at least some evidence to give rise to a
22 genuine issue of material fact as to whether such a market is
23 likely to arise.

24 **THE COURT:** Well -- but let me -- could I -- could I
25 ask you about that --

1 **MR. SHANMUGAM:** Sure.

2 **THE COURT:** -- as it gets to the burden of proof --

3 **MR. SHANMUGAM:** Yes.

4 **THE COURT:** -- and the fact that fair use is a defense
5 and all of that?

6 You -- what evidence have you put in that the market
7 concerns that I'm expressing are not likely to materialize? Is
8 it -- have you put in any evidence to that effect? Maybe your
9 answer is, "Well, they didn't really argue what you're arguing
10 now, and so we didn't need to put in any evidence."

11 **MR. SHANMUGAM:** Well, I do think that that is our
12 answer in part because, again, when it comes to the relevant
13 market effects, we, as the Court would be aware, put in
14 evidence that expression cannot be reproduced by our model.
15 And that's the so-called regurgitation issue.

16 I think it is undisputed that this model cannot, when
17 prompted, reproduce meaningful portions of expression --

18 **THE COURT:** And as an aside, it does seem like Meta
19 has done a good job perhaps, compared to a number of other
20 companies, you know, with implementing mitigations to prevent
21 its product from regurgitating.

22 **MR. SHANMUGAM:** Right.

23 And on that issue, I would point to the Ungar declaration,
24 which explains in great detail how the Llama model operates.
25 It makes clear that the Llama model, as it is constructed, can

1 reproduce, on average at most, one additional token, which is a
2 word or a portion of a word, and that that is, in large part,
3 as a result of the fact that Meta has taken great pains,
4 through deduplication, to prevent the model from excessively
5 training on a particular work such that it reproduces the
6 expression.

7 Now, the other aspect of this that was debated is this
8 question of licensing and the issues with the licensing market.
9 And on that, I would point to our expert, Dr. Michael
10 Sinkinson, who walked through, you know, all of the
11 difficulties in the creation of a market for this purpose.

12 And I've already pointed to the fact that individual books
13 have negligible value for purposes of training. I've pointed
14 to the fact that, in the context of trade books, which is
15 somewhat different from the context of other media -- that the
16 right to license the book rests with the author.

17 So there's no one place you can go in the way that there
18 is in music, for instance, where you have clearinghouses like
19 ASCAP and BMI. And I've also pointed to the fact that -- and
20 Sinkinson also pointed to the fact that these large language
21 models require, you know, large quantities of text.

22 And so one of the challenges here is that it would be
23 impractical -- and I don't think there's really any dispute
24 about this -- for a company like Meta to go to authors one by
25 one for purposes of this training.

1 In order to have an effective large language model -- and
2 Ungar talks about this at great length -- you need to have --

3 **THE COURT:** And one -- one just quick sidebar -- is
4 buying the e-book is not enough -- right? -- because the use
5 would be beyond the license that you get when you buy the
6 e-book; right?

7 **MR. SHANMUGAM:** Yes, that is correct.

8 And I think one thing that is really important to keep in
9 mind -- and this goes back to the hypotheticals involving
10 humans -- is that this is a context where you're talking about
11 a digital tool. You have to have copying in order to train the
12 tool. You have to have a digital copy. That digital copy gets
13 replicated in the training process.

14 And so that's one thing that's a little bit different
15 from, say, the human context, where the copying itself is not
16 necessary. That's relevant to Factor 3, and it's relevant to
17 the fair use analysis in other regards. And, again, I think
18 that the record is undisputed in this regard, that the more
19 materials you have to train, the better.

20 And those materials, of course, include both copyrighted
21 and non-copyrighted materials. It's not just in the trade
22 books context but beyond. You know, one of the things that is
23 discussed in the briefs is how necessary is it for us to show
24 that we needed any particular work.

25 And I would submit that that is not the appropriate

1 analysis for purposes of fair use. Instead, the question, as
2 was true in the thumbnail cases like *Kelly* and *Perfect 10*, is
3 would you have a better model if you had more materials,
4 including the copyrighted materials in question?

5 **THE COURT:** Anything else you want to say about the
6 record?

7 **MR. SHANMUGAM:** I don't think so. I think that that
8 addresses the issues that you raised in your questions
9 concerning the state of the record.

10 I think I would just make the broader point that I think
11 that one of the things that is hazardous in this area is that
12 it is very tempting to speculate about what might happen to the
13 market, and this is obviously a moving target. The way these
14 issues may look two or three years from now, when this gets to
15 the Supreme Court, may be very different from the way they look
16 now.

17 I would submit that that is really a reason to focus on
18 the record as it exists now in this case and to write an
19 opinion that --

20 **THE COURT:** Yeah.

21 And I just want to be clear that, of course, the -- you
22 know, the focus for deciding this case is on the record that --
23 in this case.

24 But I do think that, in a case like this, which is, you
25 know, more important than the average case we get, even in the

1 Northern District of California, it is important to sort of
2 develop an overall understanding of the legal issues presented
3 before diving into the facts of the case.

4 So that's why I wanted to --

5 **MR. SHANMUGAM:** Yeah. No. Understood.

6 And, look, I think we all recognize that there is no exact
7 context here in terms of the prior precedent. Again, we think
8 the *Google Books* case is probably the closest case, but AI does
9 present distinctive issues that the prior cases do not squarely
10 address.

11 I think our fundamental submission here is that you have
12 to go back to the underlying purposes of copyright law, the
13 underlying purposes of the fair use doctrine. We think that
14 they support our position here.

15 And to the extent that AI presents distinctive problems,
16 the Court should be cautious about imposing crushing copyright
17 liability that would really throttle this industry,
18 particularly in a context where it may very well be that
19 Congress needs to act to address these issues. A lot of these
20 issues concerning an artist --

21 **THE COURT:** Well, I mean, I think what you're saying
22 is a little bit question-begging; right? Imposing crushing
23 copyright liability that would really throttle the -- I mean,
24 if the -- if it was illegal for the companies to download
25 copyrighted material and use it to train the products, then

1 they're going to be subject to liability.

2 And the -- I don't think -- I mean, you seem to be saying
3 that it would be bad for these companies or it would be bad for
4 AI if you -- if you impose liability for copyright
5 infringement, and that cannot be --

6 **MR. SHANMUGAM:** Of course. Of course, Judge Chhabria.

7 **THE COURT:** I'm sure you didn't mean to be saying
8 that.

9 **MR. SHANMUGAM:** No. I think what I am saying,
10 however, is that this really goes to the issues that we were
11 discussing a minute ago about the impracticality of training
12 these tools through another means.

13 In other words, precisely because it was impossible to
14 license, the companies went this route of -- and not just Meta,
15 but other companies as well went the route of using these
16 online repositories, where they could get large quantities of
17 language in order to train these tools effectively.

18 And, of course, it's an issue not just in the
19 United States but really worldwide, where companies and other
20 company -- countries are engaging in precisely the same type of
21 development. So my point is simply the more modest one, that
22 when it comes to a transformational technological tool like
23 generative AI, the Court should be cautious about imposing
24 liability.

25 And it really is a matter, I think, ultimately for

1 Congress in the first instance if it wants to extend protection
2 beyond the protection for expression that copyright law
3 currently provides.

4 When you get into these issues such as protection of style
5 and the like, as the Court will be aware, in some contexts,
6 there is a broader right of publicity as a matter of state law.
7 There are broader protections. And it may very well be that,
8 as a matter of policy, we might, as a country, want to go
9 there.

10 **THE COURT:** And it certainly would be very easy for
11 Congress to amend the Copyright Act to say, you know, if you --
12 if you are -- if you are training your product with copyrighted
13 material and that product is going to have the ability to
14 produce -- mass-produce similar material, you need to pay a
15 royalty for it, or you need to -- you need to get a license to
16 do it.

17 **MR. SHANMUGAM:** Right.

18 And I think that any case like this, where there is no
19 suggestion that our tool is producing substantially similar
20 works -- you know, there's agreement on that. Their expert
21 Lopes agreed to that.

22 And where there is no evidence of a diminution in the
23 market for plaintiffs' works as a result of the sort of output
24 that we were discussing at the beginning of this argument, I
25 think that the Court can write a cautious opinion that focuses

1 on the record in this case and that leaves open questions about
2 what might take place in the future if these tools produce
3 outputs other than the outputs that are currently before the
4 Court.

5 And this is an area in which the technology is rapidly
6 evolving. And so, you know, I think that, from our
7 perspective, that is a reason to focus on the four corners of
8 the record here and not to indulge in significant speculation
9 about what these tools could produce. And I think all of us
10 can't resist the -- the temptation to go to these tools and
11 prompt these tools to produce things.

12 This morning, I went in my office to one of these AI tools
13 and tried to produce the *New Yorker*-style article on domestic
14 violence and was unable to do so, but I think that just
15 illustrates --

16 **THE COURT:** For the record, I have not tried to
17 produce anything on any of these AI tools --

18 **MR. SHANMUGAM:** Well --

19 (Laughter.)

20 **THE COURT:** -- but maybe I'll -- maybe I will. I
21 don't know, but I haven't -- I haven't yet.

22 **MR. SHANMUGAM:** Well, you can always ask the AI tools
23 to produce a song about Judge Chhabria in the style of
24 Taylor Swift, if you so choose.

25 **THE COURT:** Right.

1 I'm now going to do that.

2 (Laughter.)

3 **MR. SHANMUGAM:** I think that -- I think that's all we
4 have in terms of our affirmative arguments unless you have any
5 other questions.

6 **THE COURT:** And your -- your -- your concluding
7 remarks did trigger one more question in me, and then we'll
8 maybe take a little break since the court reporter has been
9 going for a while.

10 But you -- you wrote this down. You said, "There's no
11 evidence we're producing substantially similar works,"
12 and you -- and I want to -- I want to ask you a question about
13 the phrase "substantially similar" for a moment.

14 My understanding of the phrase -- the importance of the
15 phrase "substantially similar" is when you are deciding whether
16 somebody committed copyright infringement -- right? -- like
17 we -- usually, there's going to be no -- so outside the fair
18 use context -- right? -- we say -- I mean, I had a -- I had a
19 case involving Disney --

20 **MR. SHANMUGAM:** Yeah.

21 **THE COURT:** -- and the *Frozen* movie -- right? --
22 and -- and there was this animated short that someone created
23 involving a snowman and a deer struggling for a carrot on a
24 frozen pond, and then there -- you know, there -- Disney
25 produced a trailer for *Frozen*, which had Olaf and the moose.

1 Does anybody remember the moose's name? No?

2 **AUDIENCE MEMBER:** Sven.

3 **THE COURT:** Sven.

4 Olaf and Sven, you know, struggling for a carrot on a
5 frozen pond. And there was no direct evidence that anybody at
6 Disney copied her thing; right? But the inquiry is, is it --
7 is it substantially similar such that you can create -- that
8 you can -- you can draw an inference of copying? Right?

9 You used the phrase "substantially similar" in the context
10 of Factor 4; right? "There's no evidence that we're producing
11 substantially similar works." And my question to you is: Does
12 it have to be substantially similar to affect the market for
13 the works? Right? Is it -- I don't know if you were using it
14 in the colloquial sense --

15 **MR. SHANMUGAM:** Yeah.

16 **THE COURT:** -- or in the legal sense.

17 **MR. SHANMUGAM:** I think I was, but I think -- here's
18 what I would say more generally about the state of the record,
19 and then we can talk about how this maps onto the law.

20 So there's no claim in this case based on the outputs, and
21 so the questioning of the expert really focused on the issue of
22 actual reproduction of meaningful portions of plaintiffs'
23 books, and that's the Lopes testimony that I referred to. I
24 believe it's Exhibits 23, 24, and 56 of Mr. Ghajar's
25 declaration, where Lopes says, in answer to the question,

1 "You're not offering any opinion that Llama is able to
2 reproduce any significant percentage of these books; correct?"

3 "Answer: Correct."

4 Now, I don't think that there was any claim in the case
5 that Llama could produce works that were substantially similar
6 in this sort of infringement way, either.

7 **THE COURT:** In the -- right.

8 **MR. SHANMUGAM:** Yeah.

9 **THE COURT:** And -- nor, I think -- I mean, I think the
10 problem for the plaintiffs may also be that, you know, there
11 was no evidence that Llama can produce works that are
12 substantially similar in the infringement sense, in the legal
13 technical infringement sense, but also maybe no evidence, or
14 not enough evidence, that Llama will ultimately be able to, if
15 it can't already, produce works that are similar enough, in the
16 colloquial sense, to obliterate the market for the -- the
17 copyrighted works.

18 **MR. SHANMUGAM:** Yeah.

19 And I guess what I would say is that, in terms of the way
20 that you've just formulated a potential Factor 4 test, I think
21 the right way to think about the Factor 4 test is that it turns
22 not so much on that question of similarity of expression, as it
23 does on the transformative nature of the use, because that's
24 what defines what is a relevant market substitute.

25 So, in other words --

1 **THE COURT:** Then what's the point of having Factor 4?
2 I mean, are you saying Factor 4 is only relevant when the use
3 is not transformative?

4 **MR. SHANMUGAM:** Well, I'm saying that when you've got
5 a transformative use, you know -- and I would circle back to
6 the language that I quoted earlier from *HathiTrust*: "Any
7 economic harm caused by transformative uses does not count
8 because such uses do not serve as substitutes for the original
9 work."

10 And so, again, when you're talking about what constitutes
11 a substitute, the mere fact that something could be a rival
12 product, for instance, is not enough. And that's where I would
13 circle back to cases like *Connectix*, *Accolade*, and the like.

14 And, again, you know, I think, in some sense, I would
15 point to *Google Books* in this regard because you could
16 describe -- if you took an expansive view of Factor 4, you
17 could say that *Google Books* was a substitute because some
18 people who go to Google Books would end up not buying the
19 underlying books because they would find what they need, and
20 that is not enough.

21 And so, yes, there is a sense in which Factor 4 is the
22 flip side of Factor 1. The Supreme Court itself has recognized
23 that, and I would submit that the reason why that is true is to
24 avoid going all the way to the circularity problem, that if you
25 said that there is a market or a potential market for the

1 product that is the transformative use, you would always
2 satisfy Factor 4. And I think that that's how courts have
3 squared the circle in that regard.

4 And, again, the best evidence of that, Your Honor, is the
5 absence of any cases that find no fair use in the face of a
6 determination, at least a clear determination, of transform- --

7 **THE COURT:** Well, I think the main answer to that is
8 probably that, you know, there's never been a case like this.

9 But, anyway, why don't we -- why don't we take a break.
10 We've been going for a while now. Why don't we resume at
11 11:20, and I'll -- I'll turn to the plaintiffs --

12 **MR. SHANMUGAM:** Great.

13 **THE COURT:** -- unless I think of any other questions
14 that I forgot to ask you.

15 **MR. SHANMUGAM:** Great.

16 Thank you.

17 **THE CLERK:** Court is in recess.

18 (Recess taken at 11:14 a.m.)

19 (Proceedings resumed at 11:23 a.m.)

20 **THE CLERK:** Please remain seated. Please come to
21 order.

22 **THE COURT:** Okay. Mr. Boies?

23 **MR. BOIES:** Thank you, Your Honor.

24 **THE COURT:** Can you -- you know, you heard the
25 concerns I have about this issue generally and, you know, the

1 concerns that I have about the record in this case.

2 So could -- could you start off by addressing that?

3 **MR. BOIES:** Sure.

4 Let me begin by addressing the record. First, there's no
5 doubt that Meta, not the plaintiffs but Meta, bears the burden
6 of proof with respect to fair use. So if it is the case -- if
7 there is nothing in the record about some of these subjects,
8 that dooms the fair use argument.

9 **THE COURT:** Well, I mean, I guess part of it might
10 depend on what is part of the case -- right? -- whether you've
11 made it part of the case. If you haven't made it part of the
12 case, if -- you know, in the complaint and in your --

13 **MR. BOIES:** Sure.

14 **THE COURT:** -- you know, contention interrogatory
15 responses and all of that kind of stuff, if you have not
16 alleged as the basis for, you know, winning on Factor 4, the
17 kind of stuff that I'm talking about now, then I don't know if
18 they have any obligation to put forth any evidence on that
19 issue.

20 **MR. BOIES:** I would agree with the Court that --

21 **THE COURT:** Okay.

22 **MR. BOIES:** -- if we've not raised the issue, they
23 don't have to --

24 **THE COURT:** Okay.

25 **MR. BOIES:** -- deal with the issue, but I think we've

1 clearly raised the issue. Indeed, Counsel, in his argument,
2 says --

3 THE COURT: All right. So where -- where have you
4 raised the issue? Is it -- is it in the complaint anywhere?
5 Is it --

6 MR. BOIES: It is in the complaint.

7 THE COURT: Do you want to show me where -- where it
8 is in the complaint?

9 MR. BOIES: If I -- if my memory is right, it would be
10 98 -- Paragraphs 98, 99 --

11 THE COURT: Okay. Let me go --

12 MR. BOIES: -- something like that, but let me -- let
13 me just check --

14 THE COURT: Let me go there, too.

15 MR. BOIES: -- see whether -- is that the complaint?

16 THE COURT: No. It's not those paragraphs.

17 MR. BOIES: The -- well, in 98, it talks about the
18 downloading of the --

19 THE COURT: Yeah.

20 That's not what I'm talking about, though. I'm talking
21 about the outputs having an effect on the market for the
22 plaintiffs' works.

23 MR. BOIES: Well, that -- that is certainly in our
24 expert report, and let me just take -- be sure it's Exhibit 76.

25 THE COURT: It is, but Exhibit 76 is an -- is an

1 exhibit of an economist; right? So it's a report of an
2 economist, and the economist explains how, if the -- if the
3 relevant market -- if the genre is flooded with, you know,
4 cheap imitations --

5 **MR. BOIES:** Right.

6 **THE COURT:** -- produced by AI models --

7 **MR. BOIES:** Right.

8 **THE COURT:** -- that will have the following economic
9 effect on the plaintiffs' works; right? And I -- that is --
10 that all makes sense to me.

11 But the part that I think the economist doesn't cover is
12 what's the likelihood that this is going to happen as a result
13 of copyrighted works being used to train the models, how soon
14 is it going to happen, what's going to be the magnitude of it,
15 all of that kind of stuff.

16 In -- in other words, an AI expert who can explain how,
17 you know, the -- these models are on a -- you know, barreling
18 irrevocably down a path that will result in the production of
19 countless cheap imitations of copyrighted works that will
20 diminish the market for the copyrighted works.

21 **MR. BOIES:** I think I would -- would say two things.

22 First, whether or not the economist makes a good case or
23 not, I think that clearly indicates that we have put the issue
24 in the case.

25 Second, I would say I think the economist does go a little

1 further than that. For example, to the extent that there is
2 some evidence of the sharp decline in the use of people who are
3 writing articles on a freelance basis, he -- he shows that
4 correlating very sharply with open A- -- open AI.

5 So if you look at the whole set from, like, the high 90 --
6 190s to 230, I think there is -- I think there's more in --

7 **THE COURT:** You're saying the -- the paragraphs of
8 Exhibit 180 -- of Exhibit 76?

9 **MR. BOIES:** Yes.

10 **THE COURT:** Yeah.

11 **MR. BOIES:** And so I think we've clearly put that at
12 issue. They responded to that in -- in their argument. So I
13 think that's -- I think that is -- is at issue. I also think
14 the record --

15 **THE COURT:** Is there -- is there anything else in the
16 record that you would be able to point to to show that you put
17 that in issue for -- with respect to Factor 4? Because in your
18 papers --

19 **MR. BOIES:** Right.

20 **THE COURT:** Right.

21 -- you talk -- all you -- all you focus on is the market
22 for providing licenses for the downloading of this -- of these
23 works. And I -- if I remember your papers correctly, you --
24 you know, they said something about how the plaintiffs haven't
25 put any evidence in of, you know, substantially similar works

1 being produced by Llama.

2 And your response was, "Well, that's beside the point
3 because we're talking about this market for" -- "for licenses."

4 **MR. BOIES:** Well, I think --

5 **THE COURT:** And so, putting aside for a moment the
6 market about -- market for licenses, I'm just wondering if you
7 could -- it seemed like, in your papers, just from reading your
8 briefs, that you were like this stuff that I was talking to
9 Mr. Shanmugam about for the last hour and ten minutes doesn't
10 actually matter; right?

11 And so I'm -- I'm -- I'm wondering if there's anything
12 else that you could point to in the record, whether it's the
13 complaint or interrogatory responses or anything else, that
14 indicates that you thought that it did matter and that you were
15 putting it in issue in this case.

16 **MR. BOIES:** I would -- I would say, among other
17 things, our whole discussion of the style is related to this
18 issue.

19 **THE COURT:** The whole discussion of the style?

20 **MR. BOIES:** In other words, we have, in our papers --
21 and they respond to it by saying style is not a protected
22 element.

23 That's not our point. Our point is not that style is a
24 protected element. It is that the fact that it can replicate
25 the style means that it is competing with our works so that the

1 style point goes not to whether we are claiming that copying
2 style is a copyright violation.

3 What we are alleging is that the copying of the style
4 shows that this work is competitive with the work that we --
5 that we have.

6 **THE COURT:** And where is that? Can you show me where
7 that is? I apologize. It's just -- you know, there have
8 been -- I've -- there has been so much to read --

9 **MR. BOIES:** Right.

10 **THE COURT:** -- in this -- in this case. I --

11 **MR. BOIES:** I will -- I will find that part of the
12 exhibit.

13 And -- and, for example, Mr. Farnsworth, who's here,
14 testified at his deposition that he had gone to the Meta AI and
15 asked it to write something in his style, and it did write
16 something in his style. I believe that Ms. Silverman also did
17 the same thing.

18 Again, the reason that this is relevant is it shows that
19 the model is copying our creativity, and --

20 **THE COURT:** Right.

21 **MR. BOIES:** -- they're using that --

22 **THE COURT:** Right, but in terms of what -- how that is
23 ultimately going to affect the market -- I mean, I'll --
24 I'll --

25 **MR. BOIES:** Sure.

1 **THE COURT:** I -- I'm -- I have no doubt that you
2 could -- you know, that I could go on there and ask, you know,
3 the AI to write an opinion in the style of Judge Kozinski or
4 whatever; right? But -- well, I shouldn't say I have no doubt,
5 but I assume that I could do that.

6 But the -- the question I'm asking is a different one,
7 which is, you know, have you put in issue the effect of -- you
8 know, have you put in issue the question of how likely is it
9 that these models will start producing, you know, similar
10 competing works, and what effect will that have on the
11 protected works? That's really the question.

12 And then I'll add one more question before I forget, which
13 is related, which is wouldn't you also need to make some sort
14 of presentation on the difference between the effect on the
15 market without using copyrighted works to train the model
16 versus the effect on the market with using copyrighted works to
17 train the model?

18 Because, you know, there -- there's -- AI is happening.
19 Nobody's stopping AI. Whether they can use copyrighted works
20 or not, AI is happening. And AI is going to be able to produce
21 works in the genre of, you know, the plaintiffs' works.

22 And so it seems to me the real question is how much of a
23 difference is it going to make in terms of the effect on the
24 market if they're able to do AI with -- if they're able to
25 include in their models copyrighted works that are downloaded

1 without permission?

2 **MR. BOIES:** I think that the record may not be as
3 robust as either of us would like, but I think there is a lot
4 in the record about the importance to Meta of having
5 long-length books --

6 **THE COURT:** Definitely --

7 **MR. BOIES:** -- and --

8 **THE COURT:** -- but I'm not sure -- I'm not sure that
9 that speaks to the question that I'm asking, which is what's in
10 there about the effect on the market --

11 **MR. BOIES:** Well, in terms of --

12 **THE COURT:** -- for -- for plaintiffs' works?

13 **MR. BOIES:** In terms of running the model, with and
14 without, we don't have the capacity to do that.

15 Okay. And --

16 **THE COURT:** But what you're -- what you're saying -- I
17 think I understand what you're saying now. You're saying that,
18 based on the evidence that is in the record, we can assume that
19 the model is going to do -- or it's reasonable to infer that
20 the model will do a significantly better job at producing works
21 in a particular genre by virtue of having been trained on
22 copyrighted works.

23 **MR. BOIES:** Yes.

24 **THE COURT:** I get that. Okay.

25 **MR. BOIES:** Yes.

1 And, for example, the way we approached -- I mean, for
2 example, in Paragraph 9 of -- of the complaint --

3 **THE COURT:** Okay.

4 **MR. BOIES:** -- we talk about them using the
5 copyrighted books to enable their AI model to mimic the
6 copyrighted works. And in our expert report, what we say is
7 that if they mimic these -- they will be able to substitute for
8 them. That will affect the market.

9 Now, how much it will affect the market, I don't think we
10 have the capacity. That is within Meta's capacity to do. We
11 don't have the capacity to take their models and run them.
12 The -- and that is one of the reasons why I think the burden is
13 properly on the alleged infringer.

14 **THE COURT:** Yeah.

15 I mean, that's why I'm -- it's a good point, and it's --
16 it's -- I guess that's why I'm asking whether you've -- you've
17 put this in issue, you know, in the case.

18 And maybe -- maybe the answer is it doesn't matter, and
19 it's still their burden, but it would seem weird -- I mean, if
20 you -- you know, like, let's just say hypothetically they --
21 they submitted an interrogatory -- a contention interrogatory
22 to you, and they said, "State all" -- you know, "Just state all
23 facts to support your contention that you win on Factor 4."

24 And you include all this stuff about the licenses, the
25 market for license- -- licensing, but you didn't include

1 anything that Mr. Shanmugam and I were discussing this morning.

2 **MR. BOIES:** Uh-huh.

3 **THE COURT:** It -- under those circumstances, it seems
4 like it would -- it doesn't seem right to say that summary
5 judgment should be denied to them because they didn't put in
6 any -- they didn't put in evidence to -- to prove a negative.

7 **MR. BOIES:** Well, first, I think we -- we did put it
8 at issue. And I think once we put it at issue, they do have
9 the burden of proof, but --

10 **THE COURT:** But that's why I'm asking. Like, how did
11 you put it -- can you show me how you put it in issue?

12 **MR. BOIES:** Well, I think when we say that they mimic
13 it, when we say that they copy our style, when they say -- when
14 we say, in our -- our economist declaration, that this is going
15 to adversely affect the market for our work -- I think the
16 title of that is -- I think -- I think the title of these
17 sections is --

18 **THE COURT:** You're saying the section of Exhibit 76?

19 **MR. BOIES:** Court -- Exhibit 76.

20 The paragraphs start, I think, at 192 and go to 230. And
21 I think the title of that is something that -- what Meta is
22 doing will, quote, "allow creation of works that compete with
23 plaintiffs' works," which I think is exactly the point that the
24 Court is making.

25 **THE COURT:** Right, but that's an economist.

1 I mean, it -- I guess it -- the two things about that
2 statement are, one, it will allow it -- I -- I agree. You
3 know, it seems likely that it will allow it, but I don't know
4 for sure because I don't know what sort of mitigations have
5 been put in place to -- you know, to protect against that
6 beyond actually creating, you know, actual regurgitation.

7 But even assuming that the use of copyrighted material to
8 train the -- the model will allow the model to create works
9 that compete with the plaintiffs' works, there's a question of,
10 like, to what magnitude, to what extent. I've been assuming,
11 you know, based on, you know, my own sort of activities as a
12 citizen --

13 **MR. BOIES:** Hmm.

14 **THE COURT:** -- you know, reading the newspaper and
15 stuff like that -- I've been assuming that it will -- you know,
16 that these models will be capable of producing competing works
17 en masse to the point that it -- that it will obliterate the
18 market for certain copyrighted works, maybe not all -- not all
19 copyrighted works, probably not Sarah Silverman's work -- we'll
20 get to that in a minute -- but -- but a lot of copyrighted
21 works.

22 But -- but I -- I think, to rule in your favor, like, I
23 need -- I need you to show that you've made that an issue in
24 the case --

25 **MR. BOIES:** Well --

1 **THE COURT:** -- and that you've made some sort of
2 presentation on it, I think. I mean, I am struggling with the
3 burden issue; right? But -- but I just -- if you -- anyway, I
4 think I've -- I think --

5 **MR. BOIES:** I think I understand --

6 **THE COURT:** Yeah.

7 **MR. BOIES:** -- what -- what the Court is saying, and
8 what I would say to -- what I would say to the Court is -- is
9 three things.

10 First, I think that we have put it in issue, and it may be
11 that, at trial, we ought to have more evidence than we've put
12 in at summary judgment. But at summary judgment, we've put it
13 at issue, and that has clearly put the burden on them. We --
14 we talk explicitly in the expert report about them creating --
15 Meta creating works that compete with our works.

16 We have said in the complaint, and we've said in the
17 testimony in the record -- Mr. Farnsworth, Ms. Silverman, and
18 others -- that they mimic the work -- their work, that they
19 produce work in their style. I don't think you need more
20 testimony than that to say that's going to be competitive with
21 the work that our authors have produced originally.

22 So I think that the -- the record is pretty clear that we
23 have put it at issue, we've put in evidence about it, and they
24 have not.

25 And the second -- the second thing I would say is that,

1 even if we had not put in evidence here, once we've raised it,
2 they -- they cannot say, "We didn't know that" -- "we didn't
3 know it was in issue." And, indeed, I think if you look at
4 their -- their papers, they know that that is an issue.

5 The third thing that I would say is that, even if we had
6 not put it in issue, they have the burden of proving fair use,
7 and I think that one of the aspects of fair use is to deal with
8 Factor 4; that is, I think they have an obligation, even if we
9 had not put it in issue, because they have the burden on fair
10 use. They have the burden of going through Factor 4 --
11 Factors 1 through 4, indeed, and making the case on that,
12 which -- which they have not done.

13 And I think that the -- the stuff that was cited in
14 Counsel's argument about what they have in some of their expert
15 reports are, as we've put in our briefs, disputed. We have
16 disputes even -- even with respect to regurgitation and
17 memorization. Those -- those are disputed factual issues.

18 **THE COURT:** I mean, they're disputed in the sense that
19 you dispute them, but I don't know if you've put in any
20 evidence of regurgitation.

21 **MR. BOIES:** I think -- I think we did, Your Honor. I
22 think -- and I think they mentioned some of it, the Lopes
23 expert report and testimony.

24 And -- and, indeed, in the cross-examination of Ungar, he
25 talked about the extent to which you could reproduce

1 significant port- -- portions, not the whole thing. And -- and
2 our -- our expert went through and showed how you could give
3 the model a partial quotation from our authors' work, and the
4 model would complete it.

5 **THE COURT:** Could I -- could I ask you a question
6 about that?

7 So the -- you know, the ability to regurgitate a snippet
8 of a work, it seems to me, could be significant and could
9 really make the difference on the fair use question; right?

10 And I keep going back to my newspaper example -- right? --
11 is that if -- if a -- you know, if a -- if a -- if there's a
12 regurgitation of 25 percent of a news article, the heart of the
13 news article or whatever, then the fact that the other
14 75 percent is not regurgitated, it seems to me, does not matter
15 and does not help the defendant; right?

16 But if you're talking about a novel, I guess I don't
17 understand why, like, regurgitation of a snippet of a novel
18 would matter or the ability of the -- the model to complete a,
19 you know, sentence if you put part of the sentence from the
20 novel.

21 I mean, that might be because the model is trained --
22 really well-trained in language, or it might be because the
23 model has the ability to regurgitate the remainder of the
24 sentence. But either way, I'm just not sure why that is
25 terribly important from a -- a copyright standpoint.

1 **MR. BOIES:** Well, I think it depends a little bit on
2 the factor. I think if all it can do is regurgitate a snippet,
3 that snippet is not going to compete with the sale of the
4 author's book. I would agree with that.

5 On the other hand, the fact that it can regurgitate that
6 snippet indicates that what they have done in that model is
7 they have copied into the model the creativity and expression
8 of the author and --

9 **THE COURT:** I think I agree with you on that,
10 but it -- but I'm not sure how it affects Factor 4, but --
11 which I think is the most important, but I think I agree with
12 you on that.

13 I mean, if -- how is it that the copying process or the
14 training process doesn't incorporate expressive aspects of the
15 work if it gives the product the ability to engage in similar
16 expression or mimic the expression that is engaged -- you know,
17 mimicked the style or whatever? I think -- I think I agree
18 with you about that.

19 Let me -- could I ask you one other question, going back
20 to the issue of the record and whether you raised the issue of
21 the -- you know, the effect on the market in the way that I've
22 been discussing this morning? You made a comment to the effect
23 of, "Well, you know, maybe the presentation has not been as
24 robust as it should be, and maybe we'll need to put in more
25 evidence at trial."

1 I mean, didn't we have a discovery cutoff as to liability
2 with respect to the named plaintiffs in this case? And if we
3 did --

4 **MR. BOIES:** Yes.

5 **THE COURT:** -- doesn't that mean that there -- you
6 know, there's evidence that you -- if you haven't produced the
7 evidence already, you can't -- you can't use it at trial?

8 **MR. BOIES:** Well, I don't -- I wouldn't think so; that
9 is, I wouldn't think the summary judgment record is the only
10 record that we have at trial. At trial, people will come and,
11 I think, testify. And -- and, for example, they can testify
12 about what they said at their depositions.

13 I think Mr. Farnsworth can come and testify, as he
14 testified at his deposition, about how he asked the model.

15 **THE COURT:** Right, even if it's not in the summary
16 judgment record. I get that, but I'm just asking about
17 adducing additional evidence that you have not adduced and not
18 disclosed --

19 **MR. BOIES:** Well, I --

20 **THE COURT:** -- to the other side and stuff.

21 **MR. BOIES:** I don't think -- I mean, I don't think, in
22 most trials, the -- the evidence is limited to what the
23 evidence was at summary judgment. I mean, for the decision
24 that the Court needs to make, you need to make it on the
25 summary judgment record here.

1 **THE COURT:** No. I -- yeah. No. I'm asking a
2 different question.

3 I mean, usually -- maybe this is a problem with doing it
4 the way we -- you know, structuring this case the way we
5 structured it. But usually, you -- you know, you have a -- you
6 have a discovery cutoff on February 1st, and then you have an
7 expert discovery cutoff on April 1st, and then you have trial
8 on June 1st.

9 And the only material that can be used at trial was the
10 evidence that was adduced before the discovery cutoff --
11 right? -- lists like rebuttal evidence and whatever --

12 **MR. BOIES:** I don't --

13 **THE COURT:** -- right?

14 **MR. BOIES:** I don't --

15 **THE COURT:** You're the -- you're the -- you're the
16 expert trial lawyer. So tell me what I'm missing.

17 **MR. BOIES:** I think that trials often have more
18 evidence than you have at a summary judgment -- judgment
19 record.

20 **THE COURT:** Yeah, but you've got to disclose the
21 witness. If it's from an expert, you've got to prepare an
22 expert report. You've got to make them available for
23 deposition.

24 You've got to -- you know, you've got to identify all
25 documents that you're use- -- you know, assuming that you

1 received a discovery request to this effect, you've got to
2 identify all documents that you used --

3 MR. BOIES: Sure.

4 THE COURT: -- to support various contentions.

5 MR. BOIES: And we can do that, but --

6 THE COURT: So what do you have? What have you -- and
7 you have to do that before the discovery cutoff; right?

8 MR. BOIES: No. No, not usually. I mean, usually --
9 usually, you don't do your exhibits or your witnesses before
10 the discovery cutoff. I mean, you may -- if you name a new
11 witness that has not been -- take his deposition, sometimes
12 people get a chance --

13 THE COURT: Or has not been disclosed.

14 MR. BOIES: Or -- or -- well -- but you don't even
15 disclose. What you do -- under Rule 26, you will disclose
16 people with knowledge, but you will continue to update that --

17 THE COURT: Right --

18 MR. BOIES: -- throughout the --

19 THE COURT: -- but if you haven't disclosed that
20 person as somebody with knowledge, and then you, you know --

21 MR. BOIES: Right.

22 THE COURT: -- in the pretrial conference, you list
23 them as a witness, that witness will probably be excluded --
24 right? -- unless you have --

25 MR. BOIES: Unless you have a reason for why you

1 didn't list them before.

2 **THE COURT:** Yeah. Right. That's what I'm saying.

3 So I guess what I'm saying is, like, putting aside whether
4 you put this in issue, what evidence do you have now? Like,
5 what evidence have you adduced up to this point that -- that
6 the -- the markets for the plaintiffs' protected works will be
7 dramatically impacted by the proliferation of, you know,
8 competing works produced by Llama?

9 **MR. BOIES:** Well, I think that it would be, in part,
10 our expert testimony that says, "Yes, Llama can produce works
11 that compete with the works of our authors in the style of our
12 authors, that that will adversely affect their work." That is
13 a matter of economic theory that I think --

14 **THE COURT:** Well -- but let me -- so -- so let me ask
15 you about that. I mean, let's take Sarah Silverman, for
16 example --

17 **MR. BOIES:** Right.

18 **THE COURT:** -- right?

19 Her -- if I recall, her book was -- it's a memoir, and
20 it's a series of, like, ten essays or something like that;
21 right? And it's funny, and it's about her, and she's a pub- --
22 you know, a famous person.

23 Like, how is the proliferation of material from Llama
24 going to affect the market for her memoir?

25 **MR. BOIES:** Well, if --

1 **THE COURT:** What evidence is -- and is there any
2 evidence that the prolif- -- proliferation of material from
3 Llama will affect the market for her -- for her memoir?

4 **MR. BOIES:** Well, I think that, to the extent that it
5 is able to mimic her work, it will affect the market for her
6 work in different ways. One way that it will affect it is that
7 some people will read her book to learn about her. Some people
8 will read that book for the jokes, for the --

9 **THE COURT:** Because Sarah Silverman -- because they
10 know that Sarah Silverman is funny.

11 **MR. BOIES:** Because they know that Sarah Silverman is
12 funny and because it is funny, and if you have a -- and her
13 particular style, for some people, is very funny.

14 And so if you have a mimicked book in the style and jokes
15 of Sarah Silverman, that, for some people, is going to diminish
16 their interest in buying her book, and particularly --

17 **THE COURT:** And where is the evidence -- where is the
18 evidence of that?

19 **MR. BOIES:** Well, I would suggest that if it is
20 limited --

21 **THE COURT:** That seems like a -- you know, again,
22 talking about the different types of works that could be
23 copied.

24 **MR. BOIES:** Yes.

25 **THE COURT:** I mean, it seems like her work is

1 probably, like, the least likely -- the market for her work is
2 about the least likely to be affected of anybody's work, like
3 her and, you know -- and somebody who's famous and is writing
4 about themselves and, you know, is telling a story about their
5 life.

6 I mean, I, you know -- so where -- what evidence have you
7 adduced thus far in the case, whether it's in the summary
8 judgment record or not?

9 I mean, it seems like you're asking me to speculate that
10 the market for Sarah Silverman's memoir will -- will be
11 affected by the -- you know, the billions of things that Llama
12 will ultimately be capable of producing, and it's just not
13 obvious to me that that's the case.

14 **MR. BOIES:** Right.

15 I think that if you have a copy, a mimic, something that
16 is able to reproduce in the style of the original, I think, as
17 a matter of economics, that is going to compete with the
18 original. I think an economist -- our economist has said that.
19 I think an econ- -- I think an economist is entitled to say
20 that.

21 I think we have in the record --

22 **THE COURT:** What about Barack Obama's autobiography?

23 **MR. BOIES:** I think there are a lot of people who read
24 Barack Obama's biography just because they want to hear it from
25 Barack Obama.

1 And I think that in a situation like that, really unique,
2 you know -- maybe not unique, but a very unusual person in our
3 history -- I think that those -- those kind of people will want
4 to substitute -- they will want to hear what he says.

5 Now, I think the closer they mimic, I think, and
6 particularly if it's -- if it's very cheap or free, compared to
7 paying \$26 or \$46 for the book, that may affect some of the
8 market.

9 **THE COURT:** So you think -- you think Barack Obama's
10 book sales will be -- we can just assume, as a matter of
11 economics, that Barack Obama's book sales will be affected by
12 AI?

13 **MR. BOIES:** I think virtually every -- virtually every
14 economist would say that, although the degree, I think, will
15 vary, and I think the degree will vary significantly.

16 **THE COURT:** Well, doesn't that matter for purposes of
17 the fair use inquiry? Because, you know, you are -- you're
18 balancing -- I mean, the -- the *Google Books* case is an
19 example; right?

20 The -- the Pierre Leval case, the Second Circuit case --

21 **MR. BOIES:** Right.

22 **THE COURT:** I can't remember the name of it, but it --
23 you know, yes, the market for the plaintiffs' work was
24 diminished to a degree, but the transformative use was
25 substantial.

1 And so there was -- there was fair use in that case. I
2 mean, if Barack Obama filed a lawsuit -- right? -- the fair use
3 outcome, it seems to me, could be different -- right? -- from
4 the outcome of a lawsuit filed by, you know, a magazine
5 publisher, you know, the -- what's the -- what's the
6 magazine --

7 MR. BOIES: *The Atlantic* --

8 THE COURT: No. I was going to say, like, a gun
9 magazine --

10 MR. BOIES: Oh.

11 THE COURT: -- right?

12 MR. BOIES: Right.

13 THE COURT: I mean, a magazine -- the gun magazine.
14 If the -- all of a sudden, there were a bunch of magazine
15 articles about guns -- *Gun & Rifle*? Is that what it was
16 called?

17 Anyway, the -- the -- you know, if, all of a sudden, there
18 are a bunch of similar magazine articles about guns, it's going
19 to dramatically affect the market for -- for that magazine, but
20 it's barely going to affect, if at all, the market for Obama's
21 autobiography.

22 And so -- and the problem -- one problem, I think, is you
23 haven't put in anything about how the market would be affected
24 for different types of authors, different types of artists,
25 different types of producers; right?

1 **MR. BOIES:** Well, I would -- I would suggest first
2 that the plaintiffs that you have in front of you, the
3 13 plaintiffs you have in front of you, are not Barack Obamas.

4 **THE COURT:** Yeah, but what about -- that's why I asked
5 about Sarah Silverman. I mean, it's -- it's not obvious to me
6 at all.

7 I mean, it seems like you're -- you're saying that I can
8 sort of take on faith, as a matter of economics, that
9 Sarah Silverman -- the market for Sarah Silverman's memoir will
10 be affected by Llama's outputs, and I just don't know --

11 **MR. BOIES:** Well --

12 **THE COURT:** I don't -- I don't know -- there's nothing
13 I can look to in the summary judgment record to tell me that
14 that's so.

15 **MR. BOIES:** Well, I think that -- two things.

16 One, I don't want to lose --

17 **THE COURT:** Or that -- or that that competition in the
18 market -- you know, that the market for her work would be
19 affected in anything more than a de minimus way.

20 **MR. BOIES:** Well, first of all, I don't want to lose
21 track of who has the burden here -- okay? -- because we've put
22 this issue. And whether you agree or not, whether a jury would
23 agree or not, that's not the issue here, I think.

24 The second thing is that how much the market is going to
25 be affected is, as I thought you put very well in your 12th

1 question -- I think it was your 12th question -- is related to
2 how valuable it is to copy the copyrighted work.

3 We're not talking about do we have AI or not. We're going
4 to have AI. What we're talking about is, in the language of
5 the cases, is it reasonably necessary in order for them to have
6 AI for them to copy Sarah Silverman's work or Mr. Kadrey's
7 work?

8 **THE COURT:** Well, not -- not is it reasonably
9 necessary for them to have AI. I think the question would be,
10 you know, is the improvement in the creativity as a result of
11 using copyrighted works to train the model so great that it
12 justifies whatever diminishment of the market it would be
13 caused for the -- for the owners of the copyrighted works?

14 **MR. BOIES:** And --

15 **THE COURT:** Do you agree with that?

16 **MR. BOIES:** I do, Your Honor.

17 And -- and now you look at the record, and you see nothing
18 that would bear Meta's burden on that issue. And -- and if we
19 have the burden, you might be arguing do we have enough. I
20 actually think we do have enough in the record, even -- even if
21 we had the burden, but we don't have the burden.

22 **THE COURT:** Right, but you -- I mean, the thing that's
23 so procedurally odd about this situation is that you also moved
24 for summary judgment on fair use. And you -- you moved for
25 summary judgment on fair use, in part, because you contended

1 that you win the fourth factor. And -- but you didn't put in
2 anything, and you didn't rely on anything related to the stuff
3 we're discussing today.

4 I mean, you had -- yes, you have that -- those paragraphs
5 from that report from that economist, Exhibit 67. I mean,
6 that's it; right? And you didn't argue it in your motion, and
7 you didn't -- you know, you focused on the market -- you know,
8 the market for licenses.

9 And so it's -- it's just so -- I've twisted myself into a
10 pretzel trying to conceptualize this because you're right that
11 they have the burden on fair use, but you moved for summary
12 judgment on fair use. You put in the materials that you felt
13 could get you summary judgment on fair use.

14 And you barely put anything in on this issue that we've
15 been spending all this time talking about, and then you're
16 saying, "They can't have summary judgment because they didn't
17 put anything in on this issue that we didn't raise in our
18 summary judgment motion."

19 Its a -- it's a -- it's a -- it's a head-spinner for me.
20 I'm not --

21 **MR. BOIES:** Okay.

22 **THE COURT:** I'm having a hard time figuring out how
23 to -- how to deal with it.

24 **MR. BOIES:** I think that -- we did not move for
25 summary judgment on the whole case. We moved for summary

1 judgment on only those copies that they made when they were
2 downloading from the pirate websites. The -- the -- to the
3 extent that fair use --

4 **THE COURT:** I thought you moved for summary judgment
5 on all -- on all acts of training the model on copyrighted
6 works. Did I -- did I misunderstand that?

7 **MR. BOIES:** I -- I think so, but -- but if you did, we
8 obviously weren't clear enough.

9 **THE COURT:** No.

10 **MR. BOIES:** The --

11 **THE COURT:** I misunderstand things all the time.

12 **MR. BOIES:** The -- but what we were moving for summary
13 judgment on was the initial copy. There were numerous copies
14 made along the way. We were -- we were moving for summary
15 judgment just on that initial copy that they made downloading
16 it from the pirate websites, the copy that we know was made
17 from something that was illegal.

18 **THE COURT:** Could I interrupt you for a second and
19 just read to you --

20 **MR. BOIES:** Sure.

21 **THE COURT:** -- from your notice of the motion?

22 **MR. BOIES:** Yeah.

23 **THE COURT:** So just pull it up, and it's on Page 1,
24 and it says, "Take notice that we are moving for summary
25 judgment" -- no. No. Sorry. I'm looking at theirs.

1 Hold on. Let me look at yours.

2 (Laughter.)

3 **MR. BOIES:** Let me --

4 **THE COURT:** I was about to say, "Yes, you did move
5 completely on fair use."

6 **MR. BOIES:** Well, if we moved completely on fair use,
7 we didn't support it, Your Honor, in terms of --

8 **THE COURT:** Yeah.

9 Hold on. Let me just -- let me just look at it.

10 I mean, you say Meta's reproduction of plaintiffs'
11 copyrighted books without permission, including through
12 peer-to-peer file sharing, is not fair use.

13 I -- I took it to mean that you were filing a motion for
14 partial summary judgment. You weren't seeking summary judgment
15 on the distribute- -- the claim that you have for distribution,
16 but you were moving for summary judgment on your copyright
17 infringement claim based on copying.

18 That's how -- that's how I took it. That's where -- how
19 it reads to me.

20 **MR. BOIES:** And -- and you may very well be correct,
21 Your Honor. I think the -- the thrust of the motion that we
22 made was to deal with the downloading, the torrenting, and the
23 like.

24 **THE COURT:** You certainly focused heavily on that,
25 yes.

1 **MR. BOIES:** The -- and if I can limit it to this
2 point, what I would say is what we're moving for summary
3 judgment on is that downloading from the illegal websites,
4 which we don't think raises any fair use issue.

5 **THE COURT:** Right.

6 **MR. BOIES:** And -- and -- and, indeed, you know, one
7 of your, you know, questions was, you know, about how we say
8 when you download, it's dispositive. They say it's irrelevant,
9 and maybe the answer is somewhere in between.

10 But what we were -- with respect to the initial
11 downloading -- okay? -- this was -- this was something in which
12 they knew what they were copying from was not an authorized
13 copy. They concealed the use of that, which we think goes to
14 their intent and knowledge.

15 And they did this for reasons not just to train their AI
16 model. They did it in order to evaluate the works, to see
17 whether they would be valuable for the training. They used it
18 to determine whether they needed to get licenses. The record
19 is clear that they started out thinking they were going to get
20 licenses.

21 And then they decide -- then they downloaded this, and
22 they found they got good copies of this for free. And so then
23 they write internally saying, "We're only going to now license
24 the gap." By "gap," what they mean is the difference between
25 what was on the illegal websites and what they need.

1 And as late as last year, they estimate in their
2 documents, which are in -- which is -- which are in the summary
3 judgment record, that they're going to -- 10 to 20 percent of
4 the text that they're going to use, they're going to get from
5 licensing.

6 So I think that in terms of --

7 **THE COURT:** Seems kind of messed up.

8 **MR. BOIES:** Yeah. Yeah.

9 (Laughter.)

10 **THE COURT:** But the -- the question, as the courts
11 tell us over and over again, is not whether something is messed
12 up. It's -- the question is whether it's copy infringement and
13 whether it's fair use.

14 **MR. BOIES:** No, but this -- this goes to copy- --
15 whether it's copyright infringement. If they're taking illegal
16 copies, and they know they're taking illegal copies, that goes
17 to copyright infringement.

18 And I -- I don't know whether this is the right time to do
19 it or not, but I think that -- that while -- as our framing it
20 went on this morning about the issue is -- is relevant, we
21 can't lose sight of the fact that what Congress has said is
22 that you can't copy works unless you can justify it under
23 free -- under fair use.

24 It's not that you only look at whether they're copying
25 some elements or not elements. You can't copy any of those

1 copyrighted works. Okay? Whether they're copying expressive
2 elements or not goes to whether it's going to be fair use under
3 some of the cases. Those cases are -- are not at all like the
4 kind of cases the Court has in front of you today.

5 Okay. These are things like search engines, where the --
6 where the court says this is not going to affect the -- the
7 work. And when you look at *Google Books* and they say that
8 maybe somebody isn't going to buy a book because of the
9 snippets, first, the court -- the court says that's not
10 realistic.

11 And in addition to that, Google -- if you filled out an
12 online form, Google wouldn't even give you the snippets. And
13 in *HathiTrust*, we didn't even get a --

14 **THE COURT:** If the author -- if the author or the
15 copyright holder filled out a form?

16 **MR. BOIES:** Yeah, filled out an online form, and
17 that's in the Supreme Court decision.

18 And in *HathiTrust*, all we got was page numbers, which is
19 not going to substitute for -- for reading the book. The
20 courts talk about it as a pointer.

21 The other case -- the kind of cases that they cite are the
22 computer code cases, where, as the court says in *Google* against
23 *Oracle*, they said these are functional things. You're using
24 these to get at the creative value.

25 The same thing was true with -- with *Connectix* that, you

1 know, Counsel cited. They were making those intermediate
2 copies to get at the thing that they needed to get at to make
3 it compatible, and they expressly did not use any of those --
4 any of the content of that in their final product. They
5 created it all themselves. They reverse engineered it.

6 So none of those cases, I think, have anything to do with
7 the kind of case that you're -- you're dealing with here. This
8 is a situation in which, when they make the copy, it -- it
9 shouldn't make any difference. Whether they think they're
10 copying expressive elements or not-expressive elements, that's
11 a violation of the copyright law.

12 Now, they do copy the expressive elements. And when we
13 show that they can, you know, mimic it, when they show they can
14 complete the sentence, when they show they can do it in the
15 same style, that's not because each of -- one of those is
16 necessarily a copyright violation, but it shows that what they
17 have done is copy it.

18 And what they have done is create something that is
19 inconsistent with a -- with a copyholder's rights.

20 **THE COURT:** I was just reminded of one other question.
21 I think this is the last question, although I can't promise
22 that.

23 **MR. BOIES:** Yes.

24 **THE COURT:** What about the -- my shadow library
25 question? That is, you know, would a rule that said that it

1 was fair use for companies making AI models to download stuff
2 off of LibGen and other shadow libraries create -- would
3 bolster the market for those shad- -- those illegal shadow
4 libraries?

5 **MR. BOIES:** It would, Your Honor --

6 **THE COURT:** How?

7 **MR. BOIES:** -- and it would -- would in several ways.

8 First of all, the way they -- the way Meta did it -- it
9 didn't have to do it this way, but -- but the way they did
10 it --

11 **THE COURT:** Put aside the leeching for a second. I'm
12 just asking about downloading from shadow libraries; right?
13 These shadow libraries are -- they offer these copyrighted
14 works for free to download off the Internet. It's illegal for
15 them to do that; right?

16 And forget about -- I'm happy to talk about the leeching,
17 but put -- put aside the leeching for a second.

18 **MR. BOIES:** Yes. Okay. Sure.

19 **THE COURT:** And I'm just saying the -- but if we had a
20 rule, a copyright rule, that said that it's okay for companies
21 that create AI models to download works from shadow libraries,
22 would that bolster the market, strengthen the market of shadow
23 libraries? Should -- would that strengthen the position of
24 shadow libraries? Would it give strength to these illegal
25 shadow libraries?

1 And -- and you say yes, and I want to -- I want to
2 understand how.

3 MR. BOIES: Sure.

4 Well, first, if Meta is going to do it, there's going to
5 be increased pressure on all the competitors to do it.

6 THE COURT: Sure.

7 MR. BOIES: And so --

8 THE COURT: And then do we know -- speaking of
9 competitors, I mean, do we know how many people there are out
10 there in the world, how many companies there are out there in
11 the world, you know, who might use shadow libraries to download
12 copyrighted works to -- to train their models?

13 MR. BOIES: I don't think we know. I think what the
14 record does show is that there are a number of them, and they
15 are growing all the time, and that they are both people like
16 open AI and Meta who are doing very large models designed to do
17 many, many things. And then there are also people that are
18 doing much more discrete AI models.

19 But I think what we do know is that there are a number of
20 them now, and they're growing, and there are going to be a lot
21 of them in the future. And if -- if the rule is take whatever
22 you want from the shadow library:

23 A. If you have that rule, then a lot of people are going
24 to do it;

25 B. If you have that rule for some people, then everybody

1 who competes with those people are going to have to do it.

2 In addition, I don't think you can --

3 **THE COURT:** Could I -- could I ask a follow-up
4 question about that?

5 Does more people downloading stuff from shadow libraries
6 somehow strengthen the illegal shadow libraries? Do you know
7 anything about how they make their money or -- or anything like
8 that?

9 **MR. BOIES:** Most of them do not primarily make their
10 money by charging people for doing this. Most of them have
11 other ulterior purposes for -- for doing it. There are --

12 **THE COURT:** Like ideological purposes or what?

13 **MR. BOIES:** What?

14 **THE COURT:** Ideological purposes?

15 **MR. BOIES:** Ideological purposes or just -- just that
16 information ought to be free. Like, there are people who don't
17 believe in the copyright laws, generally don't believe in it.

18 Now, some of them do offer people accelerated priority
19 downloads if they pay them money, but that's not primarily --
20 they're not -- they're not profit-making organizations. They
21 are illegal. I mean, they -- they are -- you know, they're --

22 **THE COURT:** So -- so how -- how would -- so if we
23 assume that this -- you know, a rule allowing companies like
24 Meta to download stuff off -- from shadow libraries to train
25 their AIA models -- AI models, if we -- we can assume that that

1 will cause lots more companies to be downloading stuff from
2 shadow libraries to train their AI models, but how would that,
3 like, strengthen these illegal shadow libraries?

4 **MR. BOIES:** Well, the -- the more people that use
5 them -- these are often peer-to-peer, and the more people that
6 use them, the more bandwidth and processing power they have.

7 I know there -- I don't want to talk about the -- the
8 uploading right now for this purpose, but -- but most people,
9 when they download, upload at the same time. And when they do,
10 they are giving all of their bandwidth and processing power to
11 what is called the swarm, which is a phrase I had never heard
12 until this case.

13 But the -- all of the nodes, the people who participate in
14 these things, together are called a swarm. And the more people
15 that are participating in the swarm, the more efficient it --
16 the swarm is in getting all of this copyrighted material out.

17 **THE COURT:** Okay. And that's -- but that is when
18 you're downloading and uploading at the same time, leeching --

19 **MR. BOIES:** Yes.

20 **THE COURT:** -- or is it also when you are -- what's
21 the other word? Seeding?

22 **MR. BOIES:** Well, seeding and leeching are two ways of
23 uploading.

24 **THE COURT:** Seeding is uploading after the downloading
25 is complete --

1 **MR. BOIES:** Yeah.

2 **THE COURT:** -- and leeching is uploading
3 simultaneously.

4 **MR. BOIES:** That's the way I understand it.

5 **THE COURT:** Okay. And -- and so what -- so you wanted
6 to talk about the leeching.

7 So you -- so one point you're making about the leeching is
8 that if you download this, and you're -- and you're
9 simultaneously uploading materials, and you're making your
10 computing power available to the swarm, you're making it easier
11 for illegal shadow libraries to disseminate the copyrighted
12 works illegally?

13 **MR. BOIES:** Yes.

14 **THE COURT:** Okay. What -- anything else you want to
15 say about the leeching issue?

16 **MR. BOIES:** No.

17 **THE COURT:** Okay. All right.

18 **MR. BOIES:** Now -- now, in addition to the other
19 things that I just talked about, there's a reputational thing.
20 At least until companies like Meta began to do this,
21 respectable companies didn't want to be associated with these
22 pirate websites.

23 And, indeed, you see throughout Meta's documents people
24 saying, "This" -- "this is a line we shouldn't cross. We don't
25 want to be associated it. There's terrible reputational

1 risks." That discourages, and has discouraged, most companies
2 from -- you know, most large, respectable companies from using
3 these pirate websites.

4 Once, if it happens, courts begin to rule, "Well, that's
5 fair use. Go ahead and do it," the reputational stigma, which
6 is real, in terms -- most people generally don't want to be
7 associated with criminal enterprises, and -- and even if it's
8 helpful to them, they will try to avoid it. The more
9 respectability that these criminal enterprises get, the more
10 people are going to use it and the less -- the less of an
11 inhibition that will have.

12 So I think the competitive part, the -- if you let Meta do
13 it, Meta's competitors are going to have to do it, the
14 reputational part as well as the leeching --

15 **THE COURT:** And then all this stuff -- there's -- I
16 appreciate the tutorial on it, but none of this stuff is in the
17 record; correct?

18 **MR. BOIES:** None of this what?

19 **THE COURT:** None of this stuff is in the record;
20 correct?

21 **MR. BOIES:** Oh, no, no.

22 **THE COURT:** The stuff that we're talking about?

23 **MR. BOIES:** No. The -- the fact about the competition
24 is in the record. In fact, one of the things -- Meta is
25 saying, "We can't let other people get ahead of us."

1 **THE COURT:** No, no, no. I understand that, but if --

2 **MR. BOIES:** But by -- by "get ahead of us," I didn't
3 mean just generally. I meant in terms of using these pirated
4 websites.

5 **THE COURT:** Oh, yeah. No. I know that.

6 But in terms of the effect that allowing companies to use
7 the shadow libraries for this purpose would have on the shadow
8 libraries, there's nothing in -- on the record on that, is
9 there?

10 **MR. BOIES:** No, there -- no, there is, Your Honor. I
11 mean, we covered this in expert reports and in depositions in
12 terms of the bandwidth and the processing power that is --

13 **THE COURT:** The processing power part is in there?

14 Okay. All right.

15 **MR. BOIES:** The -- and, you know -- and the
16 reputational part, you know, is in there, you know -- I mean,
17 not the way I said it exactly, which is more of an argument
18 based on what's in the record, but the fact that these are
19 criminal enterprises and that people are reluctant to use them
20 for that reason -- that's in the record.

21 **THE COURT:** Okay. All right. Anything else you want
22 to -- you want to say before -- I'll let -- I'll let them have
23 the last word.

24 **MR. BOIES:** There are -- there are lots of things.

25 (Laughter.)

1 **MR. BOIES:** The -- but -- I mean, like, you know, for
2 example, on the licensing thing that was -- was talked about,
3 the -- the standard, as I know the Court knows, is not just
4 whether there's a market effect on the traditional market.
5 It's also whether there's a market effect on a market that's
6 reasonable to develop or that is likely to develop in the
7 future.

8 And -- and the fact that you had all these negotiations
9 and that you still have them saying they're going to have 10 to
10 20 percent of what they license of -- with the use --

11 **THE COURT:** Yeah.

12 I just think the problem is if -- if you can't show that,
13 you know, the proliferation of this -- of these models using
14 copyrighted works will affect, in a significant way, the market
15 for the copyrighted works, then I think the -- all the
16 discussion of the market for a license or the potential market
17 for a license is beside the point --

18 **MR. BOIES:** Well --

19 **THE COURT:** -- because I think you'd lose if you can't
20 show that the market for the copyrighted works that are being
21 used to train the models are dramatically impacted, not the
22 life -- for -- not the market for a license to use the work for
23 training AI but the market for the works themselves.

24 If you can't show that the market for the works themselves
25 is dramatically impacted by using them to train AI, then I

1 think the -- the discussion of the market for a license to use
2 the products to train AI is beside the point because you -- you
3 wouldn't win in that case because you -- you know, it's -- you
4 would lose significant -- you would lose badly on Factor 1, and
5 you wouldn't have done enough on Factor 4 to win.

6 I'd tend to agree with you. Like, I'm -- it strikes me as
7 pretty fanciful to argue that a license -- a market for a --
8 for licensing copyrighted materials for AI training could not
9 form. I mean, I -- I'm assuming, for purposes of this
10 discussion, that it could.

11 **MR. BOIES:** But if it could form, if it's original for
12 it to form.

13 **THE COURT:** Yeah.

14 **MR. BOIES:** And that is a license -- and that is a
15 market that they have the copyright for. There's no doubt
16 that --

17 **THE COURT:** No. They don't have a copyright for -- to
18 license people to use works -- their works for training AI
19 models. That's the question in this case.

20 **MR. BOIES:** No. No. I know that, but what I'm saying
21 is they -- they have that right unless -- unless it's taken
22 away by fair use.

23 **THE COURT:** Right.

24 **MR. BOIES:** So -- and --

25 **THE COURT:** And I think it's only -- it's -- it's -- I

1 think -- to be blunt about it, I think it is taken away by fair
2 use unless the plaintiff can show that the market for their
3 actual copyrighted work is going to be dramatically affected by
4 the -- the use of copyrighted works to train the models.

5 **MR. BOIES:** Right, but --

6 **THE COURT:** I think that's the heart of this -- of the
7 issue in this case and in all -- all of these cases.

8 **MR. BOIES:** Since the -- the right to license for use
9 in training for any purpose is imperative to the bundle of
10 rights that the copyright holder has, and that's a market. I
11 don't understand why that market is any more -- is less subject
12 to protection than the market for the original work.

13 The -- the copyright law clearly gives not only the right
14 to distribute your original work but the right to license
15 somebody to make a copy of that to do whatever they want, to
16 make a movie, to do something transformative with it.

17 And what Factor 4 says is that if you are adversely
18 affected in a significant way, the -- the copyright holder's
19 markets, what the copyright holder has a right to do -- that
20 that's not fair use.

21 And, for example --

22 **THE COURT:** But it just -- it begs the question of
23 whether, you know -- if -- if the use is transformative, then
24 it begs the question of whether you can make them get a
25 license.

1 **MR. BOIES:** Well --

2 **THE COURT:** And I -- I think, in a case like this, in
3 this context, you have to show something more than an adverse
4 effect on the market for licenses to train -- to use materials
5 to train AI models. I think that is circular, as the -- as the
6 other side says.

7 **MR. BOIES:** But if it is, it's circular both ways
8 because what they're saying -- because what you would have to
9 say is that it's -- it's fair use because it's transformative.
10 And because it's fair use, you don't have to look at Factor 4
11 in terms of the licensing market.

12 And I think if you look at *Warhol*, for example, in *Warhol*,
13 there was no doubt that what Andy Warhol did was transformative
14 and --

15 **THE COURT:** But the Supreme Court said that it wasn't.

16 **MR. BOIES:** No. No. That's the thing. The court did
17 not say it wasn't. What -- what in fact, what the court
18 implied was that --

19 **THE COURT:** No. She basically said that it wasn't.

20 (Laughter.)

21 **MR. BOIES:** But what the -- no. What the court
22 implied was it was transformative. And, in fact, the court
23 went out of its way to say, "We're not saying that what is here
24 is not transformative for all sorts of purposes." It's simply
25 not something that can be done for purposes of selling this" --

1 or licensing this to a magazine for a story about Richard --
2 you know -- you know, about Richard -- not Richard Prince.
3 That's a different author -- different artist -- but
4 Bob Prince.

5 **THE COURT:** Prince.

6 **MR. BOIES:** The -- I think if you look at what -- what
7 the court is saying -- is that the court is saying that this is
8 not fair use for this purpose, which is the purpose of
9 marketing it to a magazine. But the court is, I think,
10 quite -- quite pointedly, saying, "We're not saying that this
11 is not transformative for other purposes."

12 But they have -- that because this was having an effect on
13 the photograph's -- photographer's ability to license their
14 product for -- for a similar purpose, that's what made it not
15 fair use.

16 So I think that you can have something that's very --

17 **THE COURT:** Yeah, but the purpose of having the
18 photograph is to license it for use. The purpose of having --
19 of writing a book is to sell the book.

20 **MR. BOIES:** No, Your Honor. You license -- you may
21 sell the book. You may license it. You -- you license it for
22 all sorts of purposes. You can license it to make a movie.
23 You can license it to be used in a song. You can license it to
24 do a -- build on a sequel. You can license it for all sorts of
25 reasons, and when you're licensing it here, you're licensing it

1 for its creative purpose.

2 You've got to look, I would respectfully suggest, at the
3 use of the copyrighted work, not the end product of what that
4 copyrighted work does. The use here is to appropriate the
5 creativity of the author. It is not like in a -- one of these
6 computer code cases to allow somebody to connect or
7 compatibility. It's not like the search engine, which is just
8 to have a pointer to point to the copyrighted work.

9 This is -- this is a situation in which they are taking
10 the creativity. They are appropriating the creativity. That
11 is unlike any of these other cases.

12 **THE COURT:** Okay. I understand that now. I'll go
13 back and look at that.

14 **MR. BOIES:** Thank you.

15 **THE COURT:** Any other comment -- final comments?

16 **MR. BOIES:** No. Thank you.

17 **THE COURT:** No?

18 Last word?

19 **MR. SHANMUGAM:** The Court has been --

20 **THE COURT:** I think the -- I think the most important
21 thing to discuss -- I'm happy to hear whatever you want to say
22 in closing, but the most important thing to discuss is the
23 record and the burden issue --

24 **MR. SHANMUGAM:** Yeah.

25 **THE COURT:** -- relating to Factor 4.

1 today, which is whether Llama produces, or could produce, rival
2 works that could lead to reduced sales. And I do think that
3 that is a matter of proof, and I do think that the way that it
4 should work here, notwithstanding the fact that we bear the
5 ultimate burden, is whether or not this is a theory that they,
6 in fact, pursued.

7 And I would invite the Court to look at the complaint and
8 the briefing and reach a conclusion about that, but I would say
9 that the reason why this is a matter of proof is that it turns
10 on a number of very specific questions.

11 The first is the effect on the market for plaintiffs'
12 work, and I think the cases are clear that it has to be an
13 effect on plaintiffs' work, not the work of other hypothetical
14 authors.

15 The second is that it has to focus on Llama and what Llama
16 produces, and it's not enough to focus on other AI tools, which
17 operate quite differently. And the third is a facet that you
18 fastened onto, which is what would the effects be in the
19 absence of the otherwise-infringing conduct.

20 And I think, with respect, that Spulber's testimony in the
21 declaration and in his deposition falls far short of that. And
22 these are the paragraphs that my friend, Mr. Boies, referred
23 to, starting at, I believe, Paragraph 196 of the declaration.
24 And I -- those portions of the report discuss the possible
25 effect of market harm from models made by other developers. It

1 relies on statements made in news reports by nonparties.

2 And when pressed on this at his deposition, Spulber
3 admitted that he didn't look at any outputs from Llama, that he
4 didn't conduct any analysis of lost sales, and that it was
5 possible that Llama's outputs would not have a negative impact
6 on future sales of plaintiffs' books.

7 And I would go further than that and note that plaintiffs
8 themselves acknowledge that they could not identify a single
9 example of a lost sale due to Llama, and I would point to the
10 RFAs and what plaintiffs said in response to that.

11 And I would also note that our expert, Sinkinson, did
12 conduct a regression analysis that showed that there were no
13 lost sales from --

14 **THE COURT:** Yeah.

15 **MR. SHANMUGAM:** -- Llama. So --

16 **THE COURT:** I mean, I want to just -- I don't want to
17 be repeating myself too much, but I don't think that they have
18 to show lost sales; right? They have to show the potential
19 for, you know -- and a significant effect on -- on the market
20 for their product.

21 **MR. SHANMUGAM:** Yeah.

22 And I do think that, again, those paragraphs of Spulber's
23 declaration, I would submit, are not sufficient to put that
24 theory in play. And, of course, one can always speculate about
25 that. That is one of the challenges of proof in this context.

1 And I think the way to reconcile our burden with the
2 summary judgment standard here is to say that, at a minimum,
3 they have to put those theories in play. And then, at that
4 point, you apply the ordinary summary judgment standard, and
5 they have simply failed to do that.

6 **THE COURT:** Can I -- I know you wanted to --

7 **MR. SHANMUGAM:** Yeah.

8 **THE COURT:** You probably want to list the other
9 theories of market harm, but just one other question about
10 that, I think.

11 You know, I think you're right that the focus needs to be
12 on Llama; right?

13 **MR. SHANMUGAM:** Yes.

14 **THE COURT:** And -- but do you deny that Llama either
15 is capable, or soon will be capable, of mass-producing, you
16 know, works in particular genres like the young adult fiction
17 genre or the, you know, mystery genre or the romance genre or
18 whatever?

19 I mean, isn't Llama already capable of mass-producing
20 works in those genres?

21 **MR. SHANMUGAM:** So I don't mean to be difficult in
22 saying what I'm about to say. I think that that is a question
23 of proof, and I think that one of the --

24 **THE COURT:** I know. I'm just asking as a matter of
25 common sense. I mean, can't Llama -- I mean, I bet -- I

1 haven't bothered to do this, but I'm guessing, if we looked at
2 advertisement -- advertising materials for Llama, we would see
3 that Llama is touted as being able to do that kind of stuff.

4 **MR. SHANMUGAM:** Well, I think one of the real
5 difficulties here, Judge Chhabria, is that if you decide to go
6 down this route as a legal matter, I think there are some very
7 difficult legal questions about what the exact contours of this
8 rule are going to be.

9 In other words, how far do you go beyond substantial
10 similarity, for lack of a better term, in saying that a market
11 effect is going to be cognizable? And I think the easy outcome
12 in this case is to say this issue hasn't been put into play,
13 and the Court could write an opinion very easily that leaves
14 those issues open for another day.

15 But I don't want to leave you with a sense that we don't
16 have support for the notion that the cognizable effects are the
17 effects that bear on the expressive component of plaintiffs'
18 work, and I do want to leave you with just a couple of other
19 sources that I think are elucidating in this regard.

20 One of them is a source cited by the Supreme Court in
21 *Campbell*, at 510 U.S., at 591, which is an article written by
22 Patry & Perlmutter, the current register of copyrights, that I
23 think makes this exact point that I was discussing earlier
24 about the fact that the cognizable effect is the effect on the
25 expressive component of plaintiffs' work.

1 And the *Nimmer* treatise also makes this point. It makes
2 the point that Factor 4 doesn't consider, quote, "the adverse
3 impact on the potential market for plaintiff's work by reason
4 of defendant having copied from it non-copyrightable factual
5 material." That's at Section 13F.08, brackets, C, brackets, 2,
6 and it cites the *Connectix* and *Sega* case for that proposition.

7 So while I recognize that this is an issue that may not
8 have been fully fleshed out in so many terms in the case law, I
9 think both of those sources support our view that these effects
10 become uncognizable once you get beyond the expressive
11 component, and I'll circle back to that in just a second. Let
12 me just say a couple of quick things about the other theories.

13 I think your colloquy with Mr. Boies well-exposed why the
14 third theory, which is the potential market for licensing for
15 the specific use of AI training, cannot, in and of itself, be a
16 sufficient theory if the theory about effects on sales is off
17 the table, and that is because of the circularity problem that
18 we've been discussing.

19 And I would note that that really is the primary theory
20 that plaintiffs have advanced, and there's no better source for
21 that than their summary judgment briefing, where they spend
22 almost the entirety of their time on that.

23 I do think that there is no genuine issue of fact on this
24 point, and I understand what might be the judicial impulse to
25 think, "Well, this is an important enough technology that

1 surely such a market is going to develop." But I think that
2 the reasons for market failure in this particular context --
3 and by "particular context," I really mean the context of trade
4 books in particular -- are enormous, and there was no real
5 dispute about those problems.

6 It's precisely why Meta abandoned the licensing route and
7 chose to go the route that brought us here today, and I would
8 note that the other major AI developers have used these similar
9 online data sets, and we know that from the records in cases
10 that they are currently litigating as well as -- as well as
11 statements that they have made publicly.

12 And then the last thing I would say about these theories,
13 before I conclude, is that the other theory that they advance
14 in passing is this theory about the lost sale from the initial
15 acquisition. And I think the response to that is that that is
16 not cognizable for the simple reason that we could have trained
17 our tools through other means.

18 We could have borrowed books from the San Francisco Public
19 Library, leaving aside the impracticality of training on books
20 one by one. And if we had made an unauthorized copy of those
21 books, we could have trained on them without the payment that
22 would have been the lost sale, under their view. And the
23 *HathiTrust* District Court opinion, I believe, by Judge Baer in
24 the Southern District of New York makes this point.

25 And I would just say one thing about what Mr. Boies had to

1 say about the issue of bad faith here, and that is simply that
2 the important thing to remember here is that, by "bad faith,"
3 what the plaintiffs are really saying in this context is that
4 we made an unauthorized copy from an unauthorized copy, perhaps
5 even with knowledge that that was itself an unauthorized copy.

6 I think the Court is well aware of our legal arguments as
7 to why bad faith shouldn't come into the analysis, and I won't
8 say anything more about that unless the Court has any
9 questions.

10 The final thing that I would say is that I think that so
11 many of the Court's questions have been based on this very
12 understandable concern about the effect that a ruling in our
13 favor would have on creative industries.

14 But I do think that this is a problem that the copyright
15 laws do not protect against, and that is this specific
16 notion -- and the Supreme Court said this, I think, most
17 clearly in *Eldred v. Ashcroft* -- that every idea, theory, and
18 fact in a copyrighted work becomes instantly available for
19 public exploitation at the moment of publication.

20 And as other courts have said, progress -- intellectual
21 progress is possible only if a new author is free to build on
22 the work of existing ones.

23 And so, to use the example that you used with Mr. Boies,
24 it is certainly true that other comics could come along and
25 build on Sarah Silverman's memoir. They could write a memoir

1 in the style of Sarah Silverman. They could write a better
2 memoir. All of that is going to have impacts on the sales of
3 Sarah Silverman's own memoirs.

4 But copyright is meant to foster and encourage the
5 creation of new noninfringing works. It may very well be that
6 Llama and other AI tools --

7 **THE COURT:** What about machines?

8 **MR. SHANMUGAM:** Well, I think -- if machines do it, I
9 think the same analysis would apply, leaving aside that there
10 would be difficult questions down the road about who the --

11 **THE COURT:** Really? I mean, I don't know -- why would
12 the same analysis apply if the machine is creating the work? I
13 mean --

14 **MR. SHANMUGAM:** Because --

15 **THE COURT:** -- I thought that copyright was about
16 human creativity.

17 **MR. SHANMUGAM:** Well, it is, but copyright is not
18 intended to benefit authors at all costs. What copyright is
19 intended to do is to protect the expressive components of what
20 they produce and not the underlying ideas or the underlying
21 facts. And that's precisely why, if someone comes along --

22 **THE COURT:** But -- but -- I mean, you know, we're
23 balancing two things; right? One is, you know, sort of
24 promoting the creativity of the authors who have the
25 copyrighted works, and the other is using fair worst -- fair

1 use to promote the creativity of others, you know, who might
2 want to use the copyrighted works as a springboard.

3 And if the machine is doing the creating, I -- is -- is
4 copyright interested in protecting the machine --

5 **MR. SHANMUGAM:** Well, just to be clear --

6 **THE COURT:** -- the machine's ability to create?

7 **MR. SHANMUGAM:** -- the machine is not doing the
8 creating, at least now. When it comes to a tool like Llama,
9 humans are prompting Llama, and it's the humans who are really
10 using Llama as a tool to create --

11 **THE COURT:** Yeah, but if I say -- if I -- but -- hold
12 on.

13 I mean, if I say, you know, "Write a funny memoir in the
14 style of Sarah Silverman," and then they write it, the machine
15 is creating it. I'm not creating it. I have the idea for it,
16 but I'm not creating it, and you -- you're the one who's
17 hammering away at the distinction between ideas and creation;
18 right?

19 It's humans that are feeding an idea to the machine, and
20 the machine is doing the creation; right?

21 **MR. SHANMUGAM:** You're the one who is providing the
22 prompts. You may provide substantial information to the tool
23 in order to get the output and return. And, to be sure, there
24 are difficult questions --

25 **THE COURT:** If I call it "bipacking," is that what

1 that's called?

2 **MR. SHANMUGAM:** It's not a term with which I'm
3 familiar.

4 But the broader point is that there are difficult
5 questions in the law, to be sure. There are questions about,
6 you know, who will hold the copyright for the output and so
7 forth.

8 My point is simply that when we are thinking about how the
9 copyright law, as it is presently written, operates in this
10 area, regardless of how it is that subsequent works are
11 produced, what the copyright law protects is the author's
12 expression, which is embodied in the specific right to
13 reproduce and the right to produce derivative works, and that's
14 a limitation on what Mr. Boies suggested earlier.

15 Sarah Silverman does not have plenary protection over all
16 of the ideas in her memoirs. That is the classic sort of
17 building on prior ideas that the copyright laws protect. And,
18 again, if the copyright laws are going to provide broader
19 protection than that, that's a matter of Congress.

20 But this Court really doesn't need to get to that issue if
21 it leaves aside the question of whether or not the effect on
22 sales is cognizable in a case where there is simply no record
23 that there is such an effect that would give rise to the legal
24 question that you've been raising.

25 **THE COURT:** Okay. Thank you very much. It's very

1 interesting.

2 I'll issue a ruling later today. Just kidding.

3 (Laughter.)

4 **THE COURT:** I will -- I will -- I will take a lot
5 longer to think about it and then issue a ruling.

6 **THE CLERK:** Court is adjourned.

7 (Proceedings adjourned at 12:49 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Tuesday, May 6, 2025

A handwritten signature in black ink, reading "James C. Pence-Aviles", is written over a horizontal line.

James C. Pence-Aviles, RMR, CRR, CSR No. 13059
U.S. Court Reporter